No. 16-477 **Vide 16-476**	
Title:	**New Jersey Thoroughbred Horsemen's Association, Inc., Petitioner** **v.** **National Collegiate Athletic Association, et al.**
Docketed:	October 12, 2016
Lower Ct:	United States Court of Appeals for the Third Circuit
Case Numbers:	(14-4546, 14-4568, 14-4569)
Decision Date:	August 9, 2016
Questions Presented	

DATE	**PROCEEDINGS AND ORDERS**
Sep 29 2016	Petition for a writ of certiorari filed. (Response due November 14, 2016)
Oct 21 2016	Order extending time to file response to petition to and including December 14, 2016.
Nov 04 2016	Brief amicus curiae of Professor Ryan M. Rodenberg filed. VIDED.
Nov 14 2016	Brief amicus curiae of The American Gaming Association filed. VIDED.
Dec 14 2016	Brief of respondents National Collegiate Athletic Association, et al. in opposition filed. VIDED.
Dec 28 2016	DISTRIBUTED for Conference of January 13, 2017.
Dec 28 2016	Reply of petitioner New Jersey Thoroughbred Horsemen's Association, Inc. filed. (Distributed)
Jan 17 2017	The Acting Solicitor General is invited to file a brief in this case expressing the views of the United States.
May 23 2017	Brief amicus curiae of United States filed. VIDED.
Jun 06 2017	Supplemental brief of petitioner New Jersey Thoroughbred Horsemen's Association, Inc. filed. (Distributed)

Jun 06 2017	DISTRIBUTED for Conference of June 22, 2017.
Jun 26 2017	DISTRIBUTED for Conference of June 26, 2017.
Jun 27 2017	Petition GRANTED. The petition for a writ of certiorari in 16-476 is granted. The cases are consolidated and a total of one hour is allotted for oral argument. VIDED.
Jul 11 2017	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for petitioner.
Jul 19 2017	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for respondents. VIDED
Jul 21 2017	Brief amicus curiae of Professor Ryan M. Rodenberg in support of neither party filed. VIDED.
Jul 31 2017	The time to file the joint appendix and petitioners' briefs on the merits is extended to and including August 29, 2017. VIDED.
Jul 31 2017	The time to file respondents' brief on the merits is extended to and including October 16, 2017. VIDED.
Aug 29 2017	Joint appendix filed. VIDED. (Statement of costs filed)
Aug 29 2017	Brief of petitioner New Jersey Thoroughbred Horsemen's Association, Inc. filed.
Aug 29 2017	Brief amici curiae of Pacific Legal Foundation, et al. filed. VIDED.
Aug 30 2017	Brief amicus curiae of Researcher John T. Holden filed. VIDED.
Sep 05 2017	Brief amicus curiae of The American Gaming Association filed. VIDED.
Sep 05 2017	Brief amicus curiae of New Sports Economy Institute in support of neither party filed. VIDED.
Sep 05 2017	Brief amicus curiae of European Sports Security Association, et al. filed. VIDED.
Sep 05 2017	Brief amicus curiae of Congressman Frank J. Pallone, Jr. filed. VIDED.
Oct 06 2017	SET FOR ARGUMENT ON Monday, December 4, 2017. VIDED.

Oct 16 2017	Brief of respondent National Collegiate Athletic Association, et al. filed. VIDED.
Oct 18 2017	Motion of Professor Ryan M. Rodenberg for leave to participate in oral argument as amicus curiae and for divided argument filed. VIDED.
Oct 18 2017	Record requested from the U.S.C.A. 3rd Circuit.
Oct 19 2017	CIRCULATED
Oct 23 2017	Brief amicus curiae of Eagle Forum Education & Legal Defense Fund filed. VIDED. (Distributed)
Oct 23 2017	Brief amicus curiae of United States filed. VIDED. (Distributed)
Oct 23 2017	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed. VIDED.
Oct 23 2017	Brief amici curiae of Stop Predatory Gambling, et al filed. VIDED. (Distributed)
Nov 02 2017	Record received from the U.S.C.A. 3rd Circuit is electronic.
Nov 13 2017	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Nov 13 2017	Motion of Professor Ryan M. Rodenberg for leave to participate in oral argument as amicus curiae and for divided argument DENIED.
Nov 15 2017	Reply of petitioner New Jersey Thoroughbred Horsemen's Association, Inc. filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Dec 04 2017	Argued. For petitioners: Theodore B. Olson, Washington, D. C. For respondents: Paul D. Clement, Washington, D. C.; and Jeffrey B. Wall, Deputy Solicitor General, Department of Justice, Washington, D. C. (for United States, as amicus curiae.) VIDED.

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RECORD AND BRIEFS

16-477

Supreme Court, U.S.
FILED
SEP 29 2016
OFFICE OF THE CLERK

In The
Supreme Court of the United States

NEW JERSEY THOROUGHBRED HORSEMEN'S ASSOCIATION, INC.,

Petitioner,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, NATIONAL BASKETBALL ASSOCIATION, NATIONAL FOOTBALL LEAGUE, NATIONAL HOCKEY LEAGUE, OFFICE OF THE COMMISSIONER OF BASEBALL, doing business as MAJOR LEAGUE BASEBALL,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR WRIT OF CERTIORARI SUBMITTED BY NEW JERSEY THOROUGHBRED HORSEMEN'S ASSOCIATION, INC.

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QUESTION PRESENTED

In September 2013, the United States Court of Appeals for the Third Circuit upheld the Professional and Amateur Sports Protection Act (PASPA), 28 U.S.C. § 3701 *et seq.*, against a constitutional commandeering challenge by construing its proscription against States "authoriz[ing]" sports wagering "by law" as a narrow prohibition reaching only the "affirmative 'authorization by law' of gambling schemes," and not repeals by States of sports wagering prohibitions. See *Nat'l Collegiate Athletic Ass'n* v. *Gov. of N.J.* (*Christie I*), 730 F.3d 218, 233 (3d Cir. 2013). However, after New Jersey repealed certain of its prohibitions on sports wagering as applied to specific venues in the State, the *en banc* Court reversed course and broadly interpreted PASPA as making it "unlawful" for New Jersey to enact such a repeal. The Court further held that it was constitutional for federal law to dictate in this manner the extent to which States prohibit sports wagering.

The question presented is:

Does a federal statute that prohibits adjustment or repeal of state-law prohibitions on private conduct impermissibly commandeer the regulatory power of States in contravention of *New York* v. *United States*, 505 U.S. 144 (1992), and *Printz* v. *United States*, 521 U.S. 898 (1997)?

PARTIES TO THE PROCEEDING

Petitioner New Jersey Thoroughbred Horsemen's Association, Inc. (NJTHA) was a defendant in the district court and an appellant below.

Respondents National Collegiate Athletic Association (NCAA), National Basketball Association (NBA), National Football League (NFL), National Hockey League (NHL) and Office of the Commissioner of Baseball (MLB) (collectively, the "Leagues") were plaintiffs and appellees below.

Christopher J. Christie, Governor of the State of New Jersey, David L. Rebuck, Director of the New Jersey Division of Gaming Enforcement, and Frank Zanzuccki, Executive Director of the New Jersey Racing Commission, (collectively, the "State Defendants") were defendants and appellants below and are filing a separate petition for a writ of certiorari.

Stephen M. Sweeney, President of the New Jersey Senate, and Vincent Prieto, Speaker of the New Jersey General Assembly, were intervenors-defendants in the district court and appellants below.

The New Jersey Sports and Exposition Authority was a defendant in the district court but did not participate in the appeal.

The United States of America participated as an *amicus curiae* in the proceedings below.

RULE 29.6 DISCLOSURE

No parent or publicly owned corporation owns 10% or more of the stock in New Jersey Thoroughbred Horsemen's Association, Inc.

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PETITION FOR WRIT OF CERTIORARI

Petitioner NJTHA respectfully petitions for a writ of certiorari to review the *en banc* judgment of the United States Court of Appeals for the Third Circuit.

Defining "the conflicting powers of the government of the Union and of its members, as marked in that constitution," has always been acknowledged to be this Court's important constitutional duty. *M'Culloch* v. *Maryland*, 17 U.S. 316, 400-401 (1819); *id.* at 400-401 (noting that "[o]n the Supreme Court of the United States has the constitution of our country devolved this important duty"). In the decision below, however, the court of appeals failed to follow this Court's modern Tenth Amendment and federalism precedents established in *New York* v. *United States*, 505 U.S. 144 (1992), *Printz* v. *United States*, 521 U.S. 898 (1997), and *National Federation of Independent Business* v. *Sebelius*, 132 S. Ct. 2566 (2012).

OPINIONS BELOW

The majority and dissenting opinions of the *en banc* court of appeals are not yet published but are available at ___ F.3d ___, 2016 WL 4191891 (3d Cir. Aug. 9, 2016) and reproduced at Pet. Appx. A.[1] The majority and dissenting opinions of the three-judge panel of the court of appeals is reported at 799 F.3d 259 (3d

[1] References to "Pet. Appx." are to the Appendix of the Petition for Writ of Certiorari filed by the State Defendants in connection with the same August 9, 2016 judgment as this Petition.

Cir. 2015) and reproduced at Pet. Appx. C. The opinion of the district court granting summary judgment to the Leagues that was affirmed by the court of appeals is reported at 61 F.Supp.3d 488 and reproduced at Pet. Appx. D. The majority and dissenting opinions of the three-judge panel of the court of appeals in an earlier round of litigation involving these issues and parties is reported at 730 F.3d 218 (3d Cir. 2013) and reproduced at Pet. Appx. F.

JURISDICTION

The court of appeals entered its opinion on August 9, 2016 after *en banc* rehearing. An amended opinion was issued on August 11, 2016 to reflect that Judge Restrepo joined Judge Fuentes's dissent. That amendment did not affect the original filing date of the judgment on August 9, 2016. See Pet. Appx. B. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT UNDER RULE 29.4(b)

Inasmuch as the constitutionality of an Act of Congress – PASPA – is drawn into question, and the United States participated as an *amicus curiae*, but not as a party, in the proceedings below, 28 U.S.C. 2403(a) may apply.

In an earlier round of litigation involving these issues and parties (*Nat'l Collegiate Athletic Ass'n* v. *Christie*, No. 12-4947 (D.N.J.)), the district court certified to the Attorney General the fact that the constitutionality of PASPA has been drawn into question. The United States intervened pursuant to 28 U.S.C. 2403 in that earlier action, and, as set forth above, participated as an *amicus curiae* in the proceedings below in this action.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Commerce Clause of the United States Constitution provides:

> The Congress shall have Power * * * [t]o regulate Commerce with foreign Nations, and among the several States and with the Indian Tribes.

U.S. Const. Art. I, § 8, Cl. 3.

The Supremacy Clause of the United States Constitution provides:

> This Constitution and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or

> Laws of any State to the Contrary notwithstanding.

U.S. Const. Art. VI, Cl. 2.

The Tenth Amendment to the United States Constitution provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

U.S. Const. Amend. X.

The most relevant provision of PASPA (28 U.S.C. 3702) provides in pertinent part:

> It shall be unlawful for –
>
> (1) a governmental entity to * * * license, or authorize by law or compact, or
>
> (2) a person to sponsor, operate, advertise, or promote, pursuant to the law or compact of a governmental entity,
>
> a lottery, sweepstakes, or other betting, gambling, or wagering scheme based * * * on one or more competitive games in which amateur or professional athletes participate * * * or on one or more performances of such athletes in such games.

The full text of PASPA, 28 U.S.C. 3701 *et seq.*, is reproduced at Pet. Appx. H.

New Jersey's law repealing certain of its laws prohibiting sports betting at specific venues in the State,

N.J. Stat. Ann. §§ 5:12A-7 *et seq.* ("2014 Act"), is reproduced at Pet. Appx. H.

STATEMENT OF THE CASE

The NJTHA adopts and incorporates by reference the entirety of the Statement of the Case of the State Defendants that is set forth in their Petition for Writ of Certiorari filed on or about this date in connection with the same August 9, 2016 judgment as this Petition. To that Statement of the Case, the NJTHA respectfully adds the following.

The NJTHA has more than 3,000 members, consisting of thoroughbred horse owners and horse trainers from around the world. *Nat'l Collegiate Athletic Ass'n* v. *Christie*, No. 14-6450, Docket Entry ("D.E.") 21-8 ¶23 (D.N.J. Dec. 13, 2012).[2] The NJTHA is also the licensed operator and permit holder of Monmouth Park Racetrack, a thoroughbred racetrack located in Oceanport, New Jersey ("Monmouth Park"). *Id.* ¶24.

Thoroughbred racing in New Jersey provides substantial economic and other benefits to the general public, creates employment opportunities for thousands of people, and generates substantial revenues for the State of New Jersey. *Id.* ¶29.

[2] The record in this case is electronic. D.E. refers to the docket entry number on the district court's electronic case files (ECF) docket.

Monmouth Park is an integral part of all aspects of the equine industry in New Jersey. *Id.* ¶30. If Monmouth Park is forced to close it will mean the death of the thoroughbred racing industry in New Jersey. *Id.* ¶31.

Wagering on New Jersey Thoroughbred and Standardbred horse races in New Jersey has waned in recent years resulting in the loss of jobs as well as causing economic distress to the equine industry in New Jersey, especially to Monmouth Park. *Id.* ¶32. The NJTHA believes that sports betting is an essential component of the NJTHA's overall plan to make Monmouth Park an economically self-sustaining Thoroughbred Racetrack, better able to compete with racetracks in surrounding States that are bolstered by casino revenues. *Id.* ¶33.

The New Jersey equine industry is critical to New Jersey's economy and the preservation of open space in New Jersey. *Id.* ¶34. In a Report, prepared by Karyn Malinowski, Ph.D. of the Rutgers Equine Science Center, it was concluded that if racing-related and breeding farms in New Jersey were to cease operations it would have a $780 million negative annual impact, put 7,000 jobs in danger, eliminate $110 million in tax revenues, and leave over 163,000 acres of open space vulnerable to future development. *Id.*

The competitive disadvantages created by PASPA's exemption, in favor of four (4) States (especially Nevada and neighboring Delaware), from PASPA's prohibition against State authorized "by law" sports wagering has

combined with other factors to put the New Jersey horse industry, and Monmouth Park in particular, at such a severe disadvantage that the economic viability of the New Jersey horse industry and Monmouth Park has been and continues to be seriously damaged. *Id.* ¶35.

The only business revenue stream that can save Monmouth Park at the present time is revenue from sports betting. *Nat'l Collegiate Athletic Ass'n* v. *Christie*, No. 14-6450, D.E. 21-9 ¶5 (D.N.J. Oct. 22, 2014). In anticipation of being able to offer sports betting in New Jersey, the NJTHA entered into an agreement with the leading sports betting company in the world, William Hill. *Id.* ¶6 and Ex. A.

Monmouth Park, through the NJTHA, is the founding member of a private regulatory body called The Independent Sports Wagering Association ("TISWA"). *Id.* ¶7; *Nat'l Collegiate Athletic Ass'n* v. *Christie*, No. 14-6450, D.E. 21-3 (D.N.J. Oct. 13, 2014). TISWA is designed to provide integrity and protect the public with respect to sports betting. *Nat'l Collegiate Athletic Ass'n* v. *Christie*, No. 14-6450, D.E. 21-9 ¶7 (D.N.J. Oct. 22, 2014).

Monmouth Park estimates that it is losing over one million dollars every week because of its inability to offer sports betting due to the Third Circuit's judgment regarding the 2014 Act. *Nat'l Collegiate Athletic Ass'n* v. *Christie*, No. 14-6450, D.E. 21-11 ¶5 and Ex. A (D.N.J. Oct. 22, 2014).

While Monmouth Park suffers this significant injury, the Leagues continue to reap enormous profits on daily fantasy sports – wagering based on the performances of players in the Leagues' sports contests – where the Leagues are actively promoting such betting and/or owning daily fantasy betting platforms that are now authorized by law in numerous states despite the fact that PASPA may prohibit daily fantasy wagering. See *Nat'l Collegiate Athletic Ass'n* v. *Christie*, No. 14-6450, D.E. 53 (D.N.J. Nov. 17, 2014); D.E. 53-2 (D.N.J. Nov. 14, 2014); D.E. 53-3 (D.N.J. Nov. 13, 2014).

REASONS FOR GRANTING THE WRIT

The NJTHA adopts and incorporates by reference the entirety of the Reasons for Granting the Petition of the State Defendants that is set forth in their Petition for Writ of Certiorari filed on or about this date in connection with the same August 9, 2016 judgment as this Petition. To those Reasons for Granting the Petition, the NJTHA respectfully adds the following.

A. The Third Circuit's Flouting Of This Court's Anti-Commandeering Precedents Deprives The NJTHA And The People Of New Jersey Of The Political And Individual Liberties That Federalism Is Designed To Protect.

The Petition for Certiorari filed by the State Defendants – which the NJTHA fully supports and incorporates by reference – demonstrates that the Court of

Appeals flouted this Court's anti-commandeering precedents by requiring the State of New Jersey to keep in place criminal prohibitions that the State has chosen to lift.

While the State of New Jersey correctly objects to this violation of its sovereignty, our federalism does not merely protect the States, but also "secures to citizens the liberties that derive from the diffusion of sovereign power." *New York* v. *United States*, 505 U.S. 144, 181 (1992) (quoting *Coleman* v. *Thompson*, 501 U.S. 722, 759 (1991) (Blackmun, J., dissenting)). The liberties protected by federalism are both political and individual.

Politically, federalism "allows States to respond, through the enactment of positive law, to the initiative of those who seek a voice in shaping the destiny of their own times without having to rely solely upon the political processes that control a remote central power." *Bond* v. *United States*, 564 U.S. 211, 221 (2011). Individually, federalism "protects the liberty of all persons within a State by ensuring that laws enacted in excess of delegated governmental power cannot direct or control their actions." *Id.* at 221-222. These are not abstract matters for the NJTHA and its more than 3,000 members, which find themselves deprived by the Third Circuit's decision of both their political and individual liberties.

The NJTHA operates Monmouth Park Racetrack, a New Jersey institution since 1870 and an integral part of all aspects of the State's tourist and equine

industry. Foreseeing that Monmouth Park's economic survival depends on sports wagering, and that its closure would endanger the entire equine industry in New Jersey (including thousands of jobs and thousands of acres of open space), the NJTHA joined with citizens across New Jersey to change the state law prohibiting sports betting. It did so not once, but twice – the second time in reliance on the assurances that the Third Circuit, the Leagues, and the United States provided to explain their rejection of NJTHA's first efforts. These exercises of political liberty have been nullified because the Third Circuit reversed course and held that the content of New Jersey law can be dictated by the national government, in derogation of the will of the people of New Jersey and their elected representatives.

Monmouth Park is not free to offer sports wagering to its customers. And Monmouth Park's customers are not free to engage in sports wagering. Why? Not because the Congress of the United States has exercised its power to regulate interstate commerce to directly prohibit Monmouth Park and its customers from engaging in sports betting. Congress has passed no federal law that directly prohibits sports betting at Monmouth Park. And not because the Legislature of New Jersey has exercised its police power to prohibit that activity. To the contrary, the State Legislature has repealed the prior state law prohibiting sports betting at Monmouth Park.

Monmouth Park and its customers are not free to engage in sports betting because federal judges have

decreed that the prior State law prohibition against sports betting must remain in place as New Jersey law, despite an Act of the New Jersey Legislature repealing that prohibition. Thus, if the NJTHA offered sports wagering at Monmouth Park, it would face the risk of prosecution by New Jersey State officials, in a New Jersey State court, for a violation of New Jersey State law – not because of decisions made by the New Jersey Legislature and Executive, but because State officials are under a federal injunction not to give effect to the State Legislature's repeal of State law.

The NJTHA would find itself defending a charge that it violated a State law that remained State law only because of a federal compulsion in the form of a federal injunction, and prosecuted by State executives forced to prosecute only because of a federal injunction. Such commandeering of State law conflicts with *New York* v. *United States*, 505 U.S. 144 (1992), and such conscription of State law enforcement officials to carry out a federal mandate violates *Printz* v. *United States*, 521 U.S. 898 (1997). Each violation results in the unconstitutional deprivation of the political and individual liberties protected by our federalism.

In conflict with the Third Circuit's decision, the highest courts in several States have recognized that the national government lacks the constitutional authority to require States to freeze in place State law prohibitions. *Reed-Kaliher* v. *Hoggatt*, 347 P.3d 136, 141 (Ariz. 2015); *Ter Beek* v. *City of Wyoming*, 846 N.W.2d 531, 538 (Mich. 2014); *State* v. *Nelson*, 195 P.3d 826, 834 (Mont. 2008). In these decisions, the Supreme

Court of Arizona, the Supreme Court of Michigan, and the Supreme Court of Montana each relied on anti-commandeering principles to uphold the validity of State laws removing, for qualified patients, prior State law prohibitions of marijuana. See also *Conant* v. *Walters*, 309 F.3d 629, 645-646 (9th Cir. 2002) (Kozinski, J., concurring) ("much as the federal government may prefer that California keep medical marijuana illegal, it cannot force the state to do so. . . . If the federal government could make it illegal under federal law to remove a state-law penalty, it could then accomplish exactly what the commandeering doctrine prohibits: The federal government could force the state to criminalize behavior it has chosen to make legal.").

Under the Third Circuit's interpretation of the United States Constitution, all of these State Court decisions are wrong. Under the Third Circuit's reasoning, Congress has the constitutional power to prohibit States from selectively removing State law prohibitions on private conduct. The Third Circuit, unlike those State Courts, failed to recognize that while State law cannot create a defense to a federal prosecution, a State remains free to prohibit as little private conduct as it chooses under its own law.

This Court alone can make the Constitution uniform across the nation. *Martin* v. *Hunter's Lessee*, 14 U.S. 304, 348 (1816) (noting that without this Court's appellate jurisdiction "the constitution of the United States would be different in different states," producing "truly deplorable" "public mischiefs"). The Third Circuit failed to see that the Constitution, properly

interpreted, leaves the people of New Jersey as free to exercise their liberties and partially remove New Jersey's prior State law prohibiting sports gambling as it leaves the people of Arizona, Michigan, and Montana free to partially remove their prior State law prohibitions on marijuana.

This Court should grant certiorari and make this promise of liberty-enhancing federalism uniform throughout the country.

B. The Third Circuit's Decision Has Nationwide Significance Because It Casts A Long Shadow Over Numerous State Laws And Regulations Authorizing Daily "Fantasy" Sports Wagering.

The Petition for Certiorari filed by the State Defendants references the many States that have expressed interest in repealing their prohibitions on sports wagering. The Third Circuit's decision upholding PASPA and interpreting it in a manner that prevents selective repeals of State laws prohibiting sports betting impacts the efforts of these States.

The Third Circuit's decision also calls into question the laws and regulations of numerous States that have enacted regimes regulating daily fantasy sports betting. Daily fantasy sports betting ("DFS") involves wagering on performances by players in the Leagues' games as opposed to betting on the final scores of the Leagues' games. The two industry leaders in DFS, FanDuel and DraftKings, processed a combined $3 billion

in fees in connection with such games.[3] There are currently nine states that have laws authorizing daily fantasy wagering on athletic performances – New York, Massachusetts, Virginia, Colorado, Kansas, Missouri, Tennessee, Mississippi, and Indiana.[4]

The provisions of PASPA apply both to wagering on the outcome of sports games as well as wagering on the performances of the athletes in such games. See 28 U.S.C. 3702 ("It shall be unlawful for a governmental entity to * * * license, or authorize by law * * * , or a person to sponsor, operate, advertise, or promote, pursuant to the law * * * of a governmental entity, a lottery, sweepstakes, or other betting, gambling, or wagering scheme based * * * on one or more competitive games in which amateur or professional athletes participate * * * *or on one or more performances of such athletes in such games*.") (emphasis added).[5] Accordingly, all

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[3] See Don Van Natta, Jr., *Welcome to the Big Time*, Outside the Lines and ESPN Magazine (Aug. 24, 2016), http://www.espn.com/espn/feature/story/_/id/17374929/otl-investigates-implosion-daily-fantasy-sports-leaders-draftkings-fanduel.

[4] See Legislative Tracker: Daily Fantasy Sports, Sports Betting, http://www.legalsportsreport.com/dfs-bill-tracker/ (last visited September 29, 2016). In addition, twenty-four other states have introduced legislation in this area, though in many of those states that legislation has failed or is on hold. *Id.*

[5] To be sure, the Unlawful Internet Gambling Enforcement Act of 2006 (UIGEA), 31 U.S.C. 5361 *et seq.*, contains an exclusion for fantasy sports (under certain circumstances) from the prohibitions thereunder. 31 U.S.C. 5362(1)(E)(ix). But the UIGEA explicitly states that "[n]o provision of this subchapter shall be construed as altering, limiting, or extending any Federal or State law * * * prohibiting, permitting, or regulating gambling within the United States." 31 U.S.C. 5361(b). Thus, the UIGEA

States that are currently licensing or authorizing "by law" daily fantasy sports (as well as the DFS operators in those States) are, under the Third Circuit's decision, at some risk under PASPA.

The Third Circuit's decision creates uncertainty as to whether the efforts of the numerous States that have licensed and/or authorized DFS by law may violate PASPA. A determination by this Court as to whether PASPA is constitutional or not eliminates that uncertainty across the nation. Whether PASPA is a constitutional statute should not be left in the hands of the Leagues. They have already shown that they seek to enforce PASPA only when it suits their economic interests. It is emphatically the province of this Court, not the Leagues, to decide whether PASPA is constitutional or not. See *Marbury* v. *Madison*, 5 U.S. 137 (1803). Under PASPA, the only entities that have the authority to commence suit to enjoin a violation of PASPA are the United States and the "sports organization whose competitive game is alleged to be the basis of such violation." 28 U.S.C. 3703. As evidenced by this action, the United States is not independently seeking to enforce PASPA.[6] And the Leagues have no interest in seeking to enforce PASPA with respect to

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provides no immunity to suits under state law or other federal laws, such as PASPA.

[6] In *Christie I*, the Leagues commenced suit and the United States intervened pursuant to 28 U.S.C. 2403. In *Christie II*, the Leagues commenced suit and the United States decided not to intervene, though they did submit to the District Court a Statement of Interest. See *Nat'l Collegiate Athletic Ass'n* v. *Christie*, No. 14-6450, D.E. 57 (D.N.J. Nov. 19, 2014).

DFS because the Leagues are significantly involved in DFS – indeed, the Leagues have equity stakes in DFS operators such as FanDuel and DraftKings.[7]

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[7] See Dustin Gouker, *If New Jersey Really Wants to Challenge the Sports Betting Ban, Daily Fantasy Sports is the Answer*, Legal Sports Report (Aug. 30, 2016), http://www.legalsportsreport.com/11255/nj-sports-betting-legal-challenge-via-dfs/ ("There's a reason why the Leagues won't challenge the DFS laws. Three of them (NBA, NHL, Major League Baseball) have equity in either DraftKings or FanDuel. Nearly every NFL team also has a deal with one of the two DFS operators."). Even the NCAA is involved in DFS. "The Pac-12 Network and Big Ten Network, which are fully or jointly owned by the conferences and their universities, still air daily fantasy ads, although not ones that promote college games." Marc Tracy, *NCAA Distances Itself from Daily Fantasy Websites*, New York Times (Oct. 20, 2015), http://www.nytimes.com/2015/10/21/sports/ncaa-distances-itself-from-daily-fantasy-websites.html?_r=0. See generally *Nat'l Collegiate Athletic Ass'n* v. *Christie*, No. 14-6450, D.E. 53 (D.N.J. Nov. 17, 2014); D.E. 53-2 (D.N.J. Nov. 14, 2014); D.E. 53-3 (D.N.J. Nov. 13, 2014).

The NJTHA argued below that the Leagues should be estopped by the doctrine of unclean hands from seeking relief under PASPA based, in part, on the Leagues' significant involvement and equity interest in DFS and the fact that if sports betting on the Leagues' games somehow causes irreparable injury to the integrity or the appearance of the integrity of such games then *a fortiori* daily fantasy games where each individual performance is at issue would cause irreparable injury. The NJTHA, however, was prevented in taking any discovery on this issue because the District Court consolidated the Leagues' request for a preliminary injunction with a decision on the merits. The District Court, which issued an injunction against the State Defendants, held that "it is unnecessary for the Court to determine the validity of the NJTHA's assertion of unclean hands" because "no injunction is being entered against the NJTHA." Pet. Appx. D at 83a n.7.

CONCLUSION

The petition for a writ of certiorari should be granted.

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RECORD AND BRIEFS

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In The
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NEW JERSEY THOROUGHBRED HORSEMEN'S ASSOCIATION, INC.,

Petitioner,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, NATIONAL BASKETBALL ASSOCIATION, NATIONAL FOOTBALL LEAGUE, NATIONAL HOCKEY LEAGUE, OFFICE OF THE COMMISSIONER OF BASEBALL, doing business as MAJOR LEAGUE BASEBALL,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

REPLY BRIEF SUBMITTED BY NEW JERSEY THOROUGHBRED HORSEMEN'S ASSOCIATION, INC.

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INTRODUCTION

Today, it is a state law crime for Monmouth Park to offer its patrons the opportunity to wager on the outcome of professional and amateur sports contests ("sports betting"). This is true not because New Jersey citizens or lawmakers want sports betting at Monmouth Park to be a crime, in fact the opposite is true, but only because a federal injunction requires state officials to treat that state law criminal prohibition as extant and binding state law, despite the repeal of such prohibition by the state lawmakers. This is a quintessential example of federal commandeering of state legislative and executive sovereign functions.

Respondents attempt to normalize this bizarre result. They portray PASPA as a commonplace federal statute with ordinary preemptive effect. They argue this case is a repeat of *Christie I* and no more deserving of this Court's attention than any other preemption case. They are wrong.

Federal statutes that preempt state law do so as a consequence of the creation of some federal rule governing commerce.[1] That's not what PASPA does. PASPA regulates the content of state law without any federal rule governing commerce as its foundation. After the expansion to PASPA's scope in *Christie II*, PASPA has now produced the extraordinary federal injunction ordering New Jersey officials to treat state

[1] The Commerce Clause is the only suggested federal power that could support PASPA.

law as prohibiting activity that New Jersey's citizens and lawmakers have chosen not to prohibit.

In urging this Court to wait for other circuits to weigh in, or for New Jersey's lawmakers to try again, respondents completely ignore the three decisions from state courts of last resort that conflict in principle with the decision below, fail to acknowledge that New Jersey already has lifted its prohibition on sports gambling at locations other than currently-licensed casinos and racetracks, and say not a word about the significance of the decision below for the numerous state laws authorizing daily fantasy sports wagering.

Petitioners have already relied once on what the court of appeals, respondents, and the United States said was permissible, only to have them change their minds when petitioners took them at their word. Delay in resolving the important legal issues in this case is unwarranted and will likely sound the death knell for Monmouth Park as a self-sustaining thoroughbred racetrack.

I. THIS IS NOT AN ORDINARY PREEMPTION CASE.

Respondents argue that "PASPA is a straightforward exercise of Congress' power to preempt the operation of state laws that conflict with federal policy on matters within Congress' purview." Br. in Opp. 22. But unlike routine instances of preemption, PASPA does not establish an independent federal rule governing commercial conduct.

The Constitution "has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions." *New York* v. *United States*, 505 U.S. 144, 162 (1992) (citing *Coyle* v. *Smith*, 211 U.S. 559 (1911)); *National Federation of Independent Business* v. *Sebelius*, 132 S. Ct. 2566, 2602 (Roberts, C.J., joined by Breyer and Kagan, JJ.) (noting that the Constitution "'simply does not give Congress the authority to require the States to regulate.' That is true whether Congress directly commands a State to regulate or indirectly coerces a State to adopt a federal regulatory system as its own.") (quoting *New York*, 505 U.S. at 178). Instead, the Constitution "gives Congress the authority to regulate matters directly and to pre-empt contrary state regulation. Where a federal interest is sufficiently strong to cause Congress to legislate, it must do so directly; it may not conscript state governments as its agents." *New York*, 505 U.S. at 178.

The Framers deliberately chose to have federal power operate directly on individuals, coupled with the Supremacy Clause, rather than to have federal regulation of States or state laws. *M'Culloch* v. *Maryland*, 17 U.S. 316, 404-405 (1819) ("The government of the Union * * * is, emphatically and truly, a government of the people. * * * Its powers are granted by them, and are to be exercised directly on them."); *New York* v. *United States*, 505 U.S. 144, 166 (1992) ("[T]he Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States. * * * The allocation of power contained in the Commerce Clause,

for example, authorizes Congress to regulate interstate commerce directly; it does not authorize Congress to regulate state governments' regulation of interstate commerce."). See also *F.E.R.C.* v. *Mississippi*, 456 U.S. 742, 794-795 (1982) (O'Connor, J., dissenting); Jack N. Rakove, *Original Meanings*, 81-82, 171-177 (1996).

Congress certainly could have written PASPA differently so that it would have ordinary preemptive effect. Congress could have simply prohibited sports betting. In that case, sports betting would be illegal as a matter of federal law, and nothing in state law could provide immunity. That's how preemption works: Congress tells the people what they must do, what they may do, or what they can't do. The people must obey that federal law, and the courts, both state and federal, must decide cases in accordance with that federal law, "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. Art. VI, Cl. 2. The Supremacy Clause merely "creates a rule of decision" and "instructs courts what to do when state and federal law clash." *Armstrong* v. *Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1383 (2015). The federal law stands on its own bottom, can be enforced without regard to state law, and requires nothing of state law other than it give way to superior federal law. See Caleb Nelson, *Preemption*, 86 Va. L. Rev. 225, 252 (2000) (noting that "the Supremacy Clause says that courts must apply all valid rules of federal law. To the extent that applying state law would keep them from

doing so, the Supremacy Clause requires courts to disregard the state rule and follow the federal one."); Allison H. Eid, *Preemption and the Federalism Five*, 37 Rutgers L.J. 1, 38 (2005) (noting that preemption is the "doctrinal descendant" of the Supremacy Clause, which "acts as a conflict-of-laws principle that instructs courts to apply federal law in the event of a conflict with state law"); *Petersburg Cellular P'ship* v. *Nottoway County*, 205 F.3d 688, 703 (4th Cir. 2000) (Niemeyer, J.) ("Congress may govern directly the people * * * [b]ut it may not govern the states for the purpose of indirectly exacting its will on the people. Preemption involves the direct federal governance of the people in a way that supersedes concurrent state governance of the same people, not a federal usurpation of state government * * * for federal ends.").

But PASPA was not written that way, nor is it what PASPA does. As respondents themselves put it, the "federal policy" adopted by PASPA is not aimed at sports gambling, but at "state-sponsored" sports gambling. Br. in Opp. at i. ("Congress enacted the Professional and Amateur Sports Protection Act ('PASPA') to stop the spread of state-sponsored sports gambling.").

PASPA prohibits the States from authorizing sports betting. That's not a regulation of commerce; that's a regulation of the States' regulation of commerce. That's not a federal law telling the people what they can't do, anything in state law to the contrary notwithstanding. That's not a federal law that stands on its own bottom requiring nothing of state law other

than to give way to superior law. Instead, PASPA is a federal law that dictates the content of state law. It can't be enforced without regard to state law, because its very point is to control state law – exactly what the Framers viewed as a "solecism in theory" that had been "exploded on all hands." The Federalist No. 20, p. 138 (C. Rossiter ed. 1961) ("a sovereignty over sovereigns, a government over governments, a legislation for communities, as contradistinguished from individuals, as it is a solecism in theory, so in practice it is subversive of the order and ends of civil polity."); 2 The Records of the Federal Convention of 1787, p. 9 (M. Farrand ed. 1911) ("The practicability of making laws, with coercive sanctions, for the States as political bodies, had been exploded on all hands.") (statement of James Madison).

This distinctive feature of PASPA produced the extraordinary injunction in this case. If PASPA were the ordinary Commerce Clause statute portrayed by respondents, state law could be displaced and state officials ordered to stand aside while federal law was enforced. Instead, state officials have been ordered to treat state law as prohibiting activity that state lawmakers, implementing the will of its citizens, have chosen not to prohibit.[2]

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[2] Petitioners do not attach some talismanic power to the word "repeal." Other words are equally able to express the point that state lawmakers have chosen to no longer prohibit certain conduct, yet a federal decree nevertheless requires state officials

On respondents' view, preemption is not simply the result of the rule of priority established by the Supremacy Clause, enabling Congress to enact laws governing commerce that are legally effective notwithstanding state law. Instead, on respondents' view, Congress has the power to decide what commercial activity States may not authorize, untethered to Congress' own direct regulation of commerce. Yet with years to look and much legal talent to do the looking, neither respondents nor any of the many judges who have heard this case have identified a single Act of Congress under the Commerce Clause (other than PASPA itself) that purports to preempt state law except as an adjunct to direct federal regulation (or deregulation). More than a year elapsed between the filing of the complaint in *Christie I* and Judge Vanaskie's observation that "PASPA stands alone in telling the states that they may not regulate an aspect of interstate commerce that Congress believes should be prohibited." *NCAA* v. *Governor of N.J.*, 730 F.3d 208, 246 n.4 (3d Cir. 2013) (Vanaskie, J., dissenting) ("Significantly, the majority opinion does not cite any case that sustained a federal statute that purported to regulate the states under the Commerce Clause where there was no underlying federal scheme of regulation or deregulation."). Three more years have come and gone, and respondents have yet to find another example.

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to consider what was repealed (or lifted, removed, abrogated, annulled, revoked, withdrawn, rescinded, discontinued, or abandoned) as a still-standing state law prohibition of that conduct.

Petitioners' challenge does not threaten any of the statutes cited by respondents (other than PASPA itself). See Br. in Opp. at 24 n.4. So long as Congress establishes the rule by which commerce is to be conducted, contrary state law can be displaced, no matter how much that result disappoints any particular State. But what petitioners deny is that Congress can "preempt" state law by coercing state sovereign functions without creating a federal regulatory or deregulatory rule regulating interstate commerce.

II. THIS CASE PRESENTS AN IMPORTANT CONSTITUTIONAL QUESTION.

Most preemption cases present questions of statutory interpretation: how much of state law is displaced by the federal regulation (or federal deregulation). They rarely involve a challenge to the constitutionality of the federal statute.

But at the very least, PASPA raises serious constitutional concerns under the anti-commandeering doctrine, as the Third Circuit held in *Christie I*. In the absence of constitutional concerns, the most straightforward interpretation of PASPA would be that States cannot allow sports gambling. And given that PASPA was crafted before *New York* was decided, this might accurately reflect the mindset of the drafters.

If PASPA prohibits States from allowing sports gambling, it prohibits them from repealing prohibitions on sports gambling, and thereby requires them to

prohibit sports gambling. But that would plainly violate the anti-commandeering doctrine. *Conant* v. *Walters*, 309 F.3d 629, 646 (9th Cir. 2002) (Kozinski, J., concurring) ("If the federal government could make it illegal under federal law to remove a state-law penalty, it could then accomplish exactly what the commandeering doctrine prohibits: The federal government could force the state to criminalize behavior it has chosen to make legal.").

Respondents know this. That knowledge has produced the interpretive gymnastics that have plagued this litigation, with respondents and the lower courts first trying, in *Christie I*, to save PASPA by distinguishing between authorization and repeal. But when the State responded with a repeal, respondents and the lower courts tried again to formulate a construction of PASPA, attempting distinctions between partial repeal and total repeal, between permissible partial repeals and impermissible partial repeals (with the distinction between the two determined by the unhelpful and the undefined test of "common sense" (Audio of Third Circuit En Banc Oral Argument, http://www.ca3.uscourts.gov/oral-argument-recordings, of C.A. No. 14-4546 at 38th minute)), and even between acts that are repeals on their face and what respondents consider "true repeals." See Br. in Opp. at 29, 30. If PASPA is to be rescued with a savings construction, that savings construction should produce a workable legal standard to guide state lawmakers. The court of appeals has

surely not done that.[3] Worse, its attempted savings construction does not save: New Jersey officials are under a federal injunction that requires them to treat a state law criminal prohibition as valid and binding state law, even though state lawmakers have lifted that prohibition.

III. CERTIORARI SHOULD BE GRANTED NOW.

Respondents would have this court wait until another State follows New Jersey's path, changes its law, fights with the Leagues in another circuit, and wins in that circuit. But the constitutional rights of one State and its people should not depend on a sister State successfully shouldering the burden of pursuing her own rights elsewhere. This is particularly true given that the anti-commandeering principle is clearly established by this Court and by the decisions of other courts of appeals, and the Third Circuit's opinion conflicts with that principle.

Respondents also completely ignore the three decisions from state courts of last resort that conflict in principle with the decision below. Those courts have recognized that the national government lacks the constitutional authority to require States to maintain state law prohibitions that the State chooses to lift.

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[3] The Third Circuit stated that it "need not * * * articulate a line whereby a partial repeal of a sports wagering ban amounts to an authorization under PASPA" and admitted that it may be impossible for "such a line [to] be drawn." Pet. Appx. A at 24a.

See NJTHA Pet. at 11-12. See also Erwin Chemerinsky, *et al.*, *Cooperative Federalism and Marijuana Regulation*, 62 UCLA L. Rev. 74, 103 (2015) ("Because Congress has the authority under the Commerce Clause to prohibit even the intrastate cultivation and possession of marijuana, no state can erect a legal shield protecting its citizens from the reach of the CSA. But at the same time, states' decisions to eliminate state marijuana prohibitions are simply beyond the power of the federal government. The federal government cannot command any state government to criminalize marijuana conduct under state law. From that incontrovertible premise flows the conclusion that if states wish to repeal existing marijuana laws or partially repeal those laws, they may do so without running afoul of federal preemption.") (footnote omitted).

Respondents also attempt to minimize the harm of delay, noting that the injunction does not prohibit New Jersey from trying again to remove its prohibitions on sports gambling in some still broader way that respondents might deem acceptable. But we've been down that road before. New Jersey shaped the 2014 Act in reliance on the statements of respondents, the United States, and the court of appeals. The lawmaking powers of a sovereign State should not be subject to a game of blind man's bluff – or worse, a game of chicken.

While suggesting that New Jersey can try again with a broader repeal, respondents incorrectly assert that New Jersey's current repeal is limited to "casinos

and racetracks licensed to offer state-authorized gambling." Br. in Opp. 23; see also Br. in Opp. at 30 (describing the 2014 Act as an "authorization for sports gambling to occur at the state's favored venues for state-authorized gambling"). But under the 2014 Act, sports betting is not illegal at "former" racetracks. Pet. Appx. H at 220a (" 'running or harness horse racetrack' * * * includes any former racetrack where such a meeting was conducted within 15 years prior to the effective date of this act"). There are now two former racetracks in New Jersey: Garden State Park ("GSP") and Atlantic City Racecourse. Neither of these former racetracks holds a gambling license. Indeed, the former GSP racecourse premises is currently the site of a privately owned shopping mall that houses retail stores like Bed Bath & Beyond and Home Depot. The stores in the mall are not "state-authorized" or "state-licensed" gambling venues. And if Monmouth Park were to become a former racetrack and give up its license, its premises would remain a location where sports betting is not illegal under the 2014 Act.

It would be ironic if respondents' enforcement of PASPA led New Jersey to lift its prohibitions on sports gambling still further in an effort to satisfy respondents. If this Court denies certiorari, Monmouth Park might not survive to see the day when New Jersey is sufficiently expansive in its removal of state law limitations on sports gambling to satisfy respondents. But right now, today, Monmouth Park's liberty is constrained by a state criminal law that is in force, not

because state lawmakers have so legislated, but only because federal officials have so decreed.

CONCLUSION

This case presents a conflict between two profoundly different views of the distinction between permissible preemption and impermissible commandeering. For respondents, the difference is between negative commands and positive commands: Congress can prohibit but cannot mandate state action. For petitioners, the difference, drawn directly from *New York*, turns on whether Congress has created a rule that directly governs private behavior and thereby displaces contrary state law, leaving federal law to govern, or instead attempts to indirectly control private behavior through the States by mandating the content of state law or enforcement by state executives.

The petition should be granted.

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QUESTION PRESENTED

Does a federal statute that prohibits adjustment or repeal of state-law prohibitions on private conduct impermissibly commandeer the regulatory power of States in contravention of *New York* v. *United States*, 505 U.S. 144 (1992), and *Printz* v. *United States*, 521 U.S. 898 (1997)?

PARTIES TO THE PROCEEDING

Petitioner New Jersey Thoroughbred Horsemen's Association, Inc. ("NJTHA") was a defendant in the district court and an appellant below.

Respondents National Collegiate Athletic Association ("NCAA"), National Basketball Association ("NBA"), National Football League ("NFL"), National Hockey League ("NHL") and Office of the Commissioner of Baseball ("MLB") (collectively, the "Leagues") were plaintiffs and appellees below.

Christopher J. Christie, Governor of the State of New Jersey, David L. Rebuck, Director of the New Jersey Division of Gaming Enforcement, and Frank Zanzucki, Executive Director of the New Jersey Racing Commission, were defendants and appellants below (the "State Defendants").

Stephen M. Sweeney, President of the New Jersey Senate, and Vincent Prieto, Speaker of the New Jersey General Assembly, were intervenors-defendants in the district court and appellants below (the "State Legislators").

The State Defendants and the State Legislators are filing a separate brief in Docket No. 16-476, which has been consolidated with this case.

The New Jersey Sports and Exposition Authority was a defendant in the district court but did not participate in the appeal.

The United States of America participated as an *amicus curiae* in the proceedings below.

RULE 29.6 DISCLOSURE

No parent or publicly owned corporation owns 10% or more of the stock in New Jersey Thoroughbred Horsemen's Association, Inc.

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The majority and dissenting opinions of the en banc court of appeals (Pet. App. 1a-46a[1]) are reported at 832 F.3d 389. The majority and dissenting opinions of the three-judge panel of the court of appeals (Pet. App. 49a-75a) is reported at 799 F.3d 259. The opinion of the district court (Pet. App. 76a-113a) granting summary judgment to the Leagues is reported at 61 F.Supp.3d 488. The majority and dissenting opinions of the three-judge panel of the court of appeals (Pet. App. 117a-200a) in an earlier round of litigation involving these issues and parties is reported at 730 F.3d 208 (*"Christie I"*).

JURISDICTION

The court of appeals entered its judgment and opinion on August 9, 2016 after en banc rehearing. An amended opinion was issued on August 11, 2016 to reflect that Judge Restrepo joined Judge Fuentes's dissent. That amendment did not affect the original filing date of the judgment on August 9, 2016. See Pet. App. 47a-48a. The petition for a writ of certiorari was filed on September 29, 2016, and granted on June 27, 2017. The jurisdiction of this Court rests on 28 U.S.C. 1254(1). Jurisdiction in the district court was based on

[1] References to "Pet. App." are to the Appendix of the Petition for a Writ of Certiorari filed by the State Defendants and the State Legislators in Docket No. 16-476, which has been consolidated with this case.

28 U.S.C. 1331 and jurisdiction in the court of appeals was based on 28 U.S.C. 1291.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Commerce Clause of the United States Constitution provides:

> The Congress shall have Power * * * [t]o regulate Commerce with foreign Nations, and among the several States and with the Indian Tribes.

U.S. Const. Art. I, § 8, Cl. 3.

The Supremacy Clause of the United States Constitution provides:

> This Constitution and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. Art. VI, Cl. 2.

The Tenth Amendment to the United States Constitution provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the

States, are reserved to the States respectively, or to the people.

U.S. Const. Amend. X.

The most relevant provisions of the Professional and Amateur Sports Protection Act ("PASPA") – whose formal title is "An Act To prohibit sports gambling under State law, and for other purposes," 106 Stat. 4227 (Oct. 28, 1992) – provide in pertinent part:

28 U.S.C. 3702:

It shall be unlawful for –

(1) a governmental entity to sponsor, operate, advertise, promote, license, or authorize by law or compact, or

(2) a person to sponsor, operate, advertise, or promote, pursuant to the law or compact of a governmental entity,

a lottery, sweepstakes, or other betting, gambling, or wagering scheme based, directly or indirectly (through the use of geographical references or otherwise), on one or more competitive games in which amateur or professional athletes participate, or are intended to participate, or on one or more performances of such athletes in such games.

28 U.S.C. 3703:

A civil action to enjoin a violation of section 3702 may be commenced in an appropriate district court of the United States by the Attorney General of the United States, or by a professional sports organization or amateur

> sports organization whose competitive game is alleged to be the basis of such violation.

The full text of PASPA, 28 U.S.C. 3701 *et seq.*, is reproduced at Pet. App. 204a-207a.

The most relevant provisions of P.L. 2014, c. 62 ("2014 Repealer") provide in pertinent part:

CHAPTER 62

AN ACT partially repealing the prohibitions, permits, licenses, and authorizations concerning wagers on professional, collegiate, or amateur sport contests or athletic events, deleting a portion of P.L. 1977, c. 110, and repealing sections 1 through 6 of P.L. 2011, c. 231.

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey*:

C.5:12A-7 Certain provisions repealed relative to wagers on certain sports contests, athletic events.

1. The provisions of chapter 37 of Title 2C of the New Jersey Statutes, chapter 40 of Title 2A of the New Jersey Statutes, chapter 5 of Title 5 of the Revised Statutes, and P.L. 1977, c. 110 (C.5:12-1 *et seq.*), as amended and supplemented, and any rules and regulations that may require or authorize any State agency to license, authorize, permit or otherwise take action to allow any person to engage in the placement or acceptance of any wager on any professional, collegiate, or amateur sport contest or athletic event, or that prohibit participation in or operation of a pool that accepts such wagers, are repealed to the extent they apply or

may be construed to apply at a casino or gambling house operating in this State in Atlantic City or a running or harness horse racetrack in this State, to the placement and acceptance of wagers on professional, collegiate, or amateur sport contests or athletic events by persons 21 years of age or older situated at such location or to the operation of a wagering pool that accepts such wagers from persons 21 years of age or older situated at such location, provided that the operator of the casino, gambling house, or running or harness horse racetrack consents to the wagering or operation.

As used in this act, P.L. 2014, c. 62 (C.5:12A-7 *et al.*):

"collegiate sport contest or athletic event" shall not include a collegiate sport contest or collegiate athletic event that takes place in New Jersey or a sport contest or athletic event in which any New Jersey college team participates regardless of where the event takes place; and

"running or harness horse racetrack" means the physical facility where a horse race meeting with parimutuel wagering is conducted and includes any former racetrack where such a meeting was conducted within 15 years prior to the effective date of this act, excluding premises other than those where the racecourse itself was located.

C.5:12A-8 Construction of act.

2. The provisions of this act P.L. 2014, c. 62 (C.5:12A-7 *et al.*), are not intended and shall not be construed as causing the State to sponsor, operate, advertise, promote, license, or authorize by law or compact the placement or acceptance of any wager on any professional, collegiate, or amateur sport contest or athletic event but, rather, are intended and shall be construed to repeal State laws and regulations prohibiting and regulating the placement and acceptance, at a casino or gambling house operating in this State in Atlantic City or a running or harness horse racetrack in this State, of wagers on professional, collegiate, or amateur sport contests or athletic events by persons 21 years of age or older situated at such locations.

The full text of New Jersey's 2014 Repealer is reproduced at Pet. App. 218a-222a.

STATEMENT OF THE CASE

The factual background and procedural history as set forth in the Statement of the Case of the State Defendants and State Legislators in their Brief for Petitioners in Docket No. 16-476 is incorporated herein by reference. To that Statement of the Case, the NJTHA respectfully adds the following facts specific to the NJTHA.

A. Description Of The NJTHA

The NJTHA has more than 3,000 members, consisting of thoroughbred horse owners and horse trainers from around the world. J.A. 217 ¶23. The NJTHA is also the licensed operator and permit holder of Monmouth Park Racetrack, a thoroughbred racetrack located in Oceanport, New Jersey ("Monmouth Park"). *Id.* ¶24. Monmouth Park is one of the venues at which the 2014 Repealer removes sports gambling prohibitions. See Pet. App. 219a-220a § 1.

Monmouth Park is an integral part of all aspects of the equine industry in New Jersey. J.A. 218 ¶30. If Monmouth Park is forced to close it will mean not only the death of the thoroughbred racing industry in New Jersey, but, also, will irreparably damage New Jersey's equine industry. J.A. 219 ¶¶31, 34.

Wagering on New Jersey thoroughbred and standardbred horse races in New Jersey has waned in recent years resulting in the loss of jobs as well as causing economic distress to Monmouth Park and the entire equine industry in New Jersey. J.A. 219 ¶32. The NJTHA believes that sports betting is an essential component of the NJTHA's overall plan to make Monmouth Park an economically self-sustaining thoroughbred racetrack better able to compete with racetracks in surrounding States that are bolstered by casino revenues. *Id.* ¶33.

The New Jersey equine industry is critical to New Jersey's economy and the preservation of open spaces in New Jersey. J.A. 219 ¶34. In a 2009 Report, prepared

by Karyn Malinowski, Ph.D. of the Rutgers Equine Science Center, it was concluded that if racing-related and breeding farms in New Jersey were to cease operations it would have a $780 million negative annual impact, put 7,000 jobs in danger, eliminate $110 million in tax revenues, and leave over 163,000 acres of open space vulnerable to future development. *Ibid.*[2]

PASPA's exemption in favor of four (4) States (especially Nevada and neighboring Delaware) from its prohibition against state authorized by law sports wagering creates competitive disadvantages for New Jersey. J.A. 219-220 ¶35. Specifically, this exemption has combined with other factors to put the New Jersey equine industry, and Monmouth Park in particular, at

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[2] The New Jersey equine industry, in general, and the New Jersey horse racing industry, in particular, have continued to struggle mightily in recent years. See, *e.g.*, Karyn Malinowski, Ph.D. and Paul D. Gottlieb, Ph.D., *2014 State of the New Jersey Horse Racing Industry Report*, Rutgers Equine Science Center, at 2 (2014), http://www.bloodhorse.com/pdf/2014NJHealthOfHorseRacingReport.pdf ("indicators of the health and well-being of the horse racing industry suggest that the industry is struggling in spite of efforts of racetrack management and organizations representing horse owners and breeders"); *id.* at 3 ("The installation of casino gaming and sports betting at New Jersey racetracks would be a relatively quick and easy way to slow down these trends, to New Jersey's advantage."); *id.* at 8 ("live handle at the racetracks *** has seen a 35 percent decrease since 2010"); *id.* at 17 ("Horse farms continue to sell disproportionately and one can see that the trend of preserving equine-related properties in New Jersey is decreasing.").

such a severe disadvantage that their economic viability has been and continues to be seriously damaged. *Ibid.*

The NJTHA believes that the only revenue stream that can save Monmouth Park at the present time is revenue from sports betting. J.A. 225 ¶5. In anticipation of being able to offer sports betting at Monmouth Park, the NJTHA entered into an agreement with the leading sports betting company in the world, William Hill. *Id.* ¶6; J.A. 229.

Monmouth Park, through the NJTHA, is the founding member of a private regulatory body called The Independent Sports Wagering Association ("TISWA"). J.A. 226 ¶7; J.A. 148-152. TISWA is designed to provide integrity and protect the public with respect to sports betting. J.A. 226 ¶7.

As a result of the court of appeals' en banc judgment and affirmance of the district court's injunction, Monmouth Park estimates that it is losing over one million dollars every week because of its inability to conduct sports betting. J.A. 236 ¶5; J.A. 238.

B. The Leagues' Ownership Of And Support For Fantasy Sports Wagering Platforms

While Monmouth Park and the New Jersey equine industry suffer because Monmouth Park is prohibited from conducting sports wagering, the Leagues have been profiting from fantasy sports betting ("Fantasy"). Fantasy, and especially daily fantasy sports betting

("DFS"), involves betting on the performances of players in the Leagues' games as well as non-Leagues' games. The two industry leaders in Fantasy and DFS, FanDuel and DraftKings, processed a combined $3 billion in fees in 2015. See Don Van Natta, Jr., *Welcome to the Big Time*, Outside the Lines and ESPN Magazine (Aug. 24, 2016), http://www.espn.com/espn/feature/story/_/id/17374929/otl-investigates-implosion-daily-fantasy-sports-leaders-draftkings-fanduel.

PASPA's provisions apply to Fantasy and DFS. Under Section 3702 of PASPA: "It shall be unlawful for a governmental entity to * * * license, or authorize by law * * * [a] betting, gambling, or wagering scheme based * * * on one or more competitive games in which amateur or professional athletes participate * * * *or on one or more performances of such athletes in such games*) (emphasis added).[3] As set forth in the Senate Report accompanying PASPA, "[t]he prohibition of section 3702 applies regardless of whether the scheme is based on chance or skill, or on a combination thereof. Moreover, the prohibition is intended to be broad enough to include all schemes involving an actual

[3] Although the Unlawful Internet Gambling Enforcement Act of 2006 (UIGEA) (31 U.S.C. 5361 *et seq.*, contains an exclusion for fantasy sports (under certain circumstances) from the prohibitions thereunder (31 U.S.C. 5362(1)(E)(ix)), the UIGEA explicitly states (31 U.S.C. 5361(b)) that nothing contained therein has any effect on any state or federal law prohibiting, permitting or regulating gambling. Thus, the UIGEA provides no immunity to suits under other laws, such as PASPA.

game or games, or an actual performance or performances therein." S. Rep. No. 248, 102nd Cong., 1st Sess. 9 (1991).

Despite the fact that PASPA makes it "unlawful" for States to "authorize by law" betting on the "performances of such athletes" in the Leagues' games, the Leagues have done nothing to stop the spread of Fantasy or DFS wagering.[4] To the contrary, some Leagues own equity stakes in Fantasy and DFS companies such as FanDuel and DraftKings. For the Leagues, Fantasy and DFS is a burgeoning and profitable business that, apparently, they do not see as a threat to the integrity of their games. See Dustin Gouker, *If New Jersey Really Wants to Challenge the Sports Betting Ban, Daily Fantasy Sports is the Answer*, Legal Sports Report (Aug. 30, 2016), http://www.legalsportsreport.com/11255/nj-sports-betting-legal-challenge-via-dfs/ ("There's a reason why the leagues won't challenge the DFS laws. Three of them (NBA, NHL, Major League Baseball) have equity in either DraftKings or FanDuel. Nearly

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[4] There are currently 16 States that have laws authorizing DFS wagering on athletic performances (Arkansas, Colorado, Delaware, Indiana, Kansas, Maine, Maryland, Massachusetts, Mississippi, Missouri, New Hampshire, New Jersey, New York, Tennessee, Vermont, and Virginia) and six more States (Illinois, Michigan, North Carolina, Ohio, Pennsylvania, and Washington) have introduced legislation in this area. See Legislative Tracker: Daily Fantasy Sports, Sports Betting, http://www.legalsportsreport.com/dfs-bill-tracker/ (last visited Aug. 29, 2017). See also Dustin Gouker, *New Jersey Gov. Christie Signs Fantasy Sports Bill; 16th State to Enact Law for DFS*, Legal Sports Report (Aug. 24, 2017), https://www.legalsportsreport.com/15238/new-jersey-fantasy-sports-law/.

every NFL team also has a deal with one of the two DFS operators.").[5]

C. New Jersey's Criminal Laws Prohibiting Sports Gambling

The 2014 Repealer repeals all laws, rules, and regulations that prohibit sports betting at Atlantic City casinos, current racetracks, and former racetrack racecourses. Pet. App. 219a-220a.[6] Chapter 37 of Title 2C of the New Jersey Statutes ("Chapter 37") contains New Jersey's criminal gambling prohibitions. N.J. Stat. Ann. § 2C:37-1 *et seq.*

Under Section 2(b) of Chapter 37, a person who "engag[es] in bookmaking[7] to the extent he receives or

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[5] Even the NCAA is involved in Fantasy and DFS. "The Pac-12 Network and Big Ten Network, which are fully or jointly owned by the conferences and their universities, still air daily fantasy ads, although not ones that promote college games." Marc Tracy, *NCAA Distances Itself from Daily Fantasy Websites*, New York Times (Oct. 20, 2015), http://www.nytimes.com/2015/10/21/sports/ncaa-distances-itself-from-daily-fantasy-websites.html?_r=0. See generally J.A. 338-340, 343-350.

[6] The 2014 Repealer applies to "racecourse" "premises" of any "former racetrack" in New Jersey. Pet. App. 220a. There are two "former" racetracks in New Jersey – Garden State Park ("GSP") and, as of January 2015, Atlantic City Racecourse. Neither of these "former" racetracks holds a gambling license. The site of the former GSP "racecourse" is now the site of a private shopping mall where businesses such as Home Depot, Bed Bath & Beyond, Best Buy, and Barnes & Noble are located. See http://marketplaceatgardenstatepark.com/.

[7] Chapter 37 defines "bookmaking" as "advancing gambling activity by unlawfully accepting bets from members of the public

accepts in one day more than five bets totaling more than $1,000 * * * is guilty of a crime of the third degree and * * * shall be subject to a fine of not more than $35,000 and any other appropriate disposition authorized by N.J.S.2C:43-2b." N.J. Stat. Ann. § 2C:37-2(b). A person convicted of a crime of the third degree may be sentenced to imprisonment for a term between three and five years. N.J. Stat. Ann. § 2C:43-6(a)(3).

D. The District Court's Injunction

On October 20, 2014, the Leagues filed a complaint seeking temporary restraints and a preliminary injunction against the NJTHA as well as the State Defendants. Pet. App. 86a-87a. On October 24, 2014, the district court granted the Leagues' application for a temporary restraining order ("TRO"). *Id.* at 87a. The TRO restrained the NJTHA from conducting sports wagering at Monmouth Park. J.A. 260. The district court required the Leagues, pursuant to Rule 65(c) of the Federal Rules of Civil Procedure, to post a security bond in the amount of $1.7 million. Pet. App. 87a; see also J.A. 236 ¶5; J.A. 238.[8]

In opposing the Leagues' request for an injunction the NJTHA argued, *inter alia*, that the Leagues had

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upon the outcome of future contingent events as a business." N.J. Stat. Ann. § 2C:37-1(g).

[8] To allow for additional briefing, the district court extended the TRO for an additional fourteen days, until November 21, 2014, and ordered the Leagues to post an additional bond in the amount of $1.7 million, for a total bond of $3.4 million. Pet. App. 87a n.6; J.A. 262.

"unclean hands" based, in part, on the Leagues' significant involvement and equity interest in an activity prohibited by PASPA – state "authorize[d] by law" Fantasy and DFS wagering. The NJTHA contended that if sports betting on the Leagues' games allegedly threatened the integrity of the Leagues' games then, *a fortiori*, Fantasy and DFS betting on the performances of the Leagues' players in the Leagues' games would threaten the integrity of the Leagues' games. J.A. 338-340. The district court prevented the NJTHA from taking any discovery on the Leagues' "unclean hands" and, instead, consolidated the Leagues' request for a preliminary injunction with a decision on the merits. Pet. App. 88a; J.A. 34-35 at ECF Nos. 50, 56.

On November 21, 2014, the district court held the 2014 Repealer was prohibited by PASPA and, thus, invalid. It enjoined the State Defendants "from violating PASPA through giving operation or effect to the 2014 [Repealer] in its entirety." Pet. App. 113a; see also J.A. 383. The district court did not enjoin the NTJHA, writing that "it is unnecessary for the Court to determine the validity of the NJTHA's assertion of unclean hands" because "no injunction is being entered against the NJTHA." Pet. App. 92a n.7.

SUMMARY OF ARGUMENT

There are two alternative ways to decide this case. First, if PASPA is given its most natural construction, it violates the Tenth Amendment and principles of

structural federalism because it commands States to govern according to Congress's instructions. Second, if PASPA is susceptible of a reasonable avoidance construction then it may be construed to allow States to repeal, in whole or in part, sports betting prohibitions. Either way, New Jersey's 2014 Repealer is valid.

PASPA makes it "unlawful" for States to "license, or authorize by law" a "betting, gambling, or wagering scheme based, directly or indirectly * * * , on one or more competitive games in which amateur or professional athletes participate * * * or on one or more performances of such athletes in such games." 28 U.S.C. 3702. PASPA treats the sovereignty of the States unequally by exempting four States (at least partially) from its prohibitions. The exempt States are Nevada, Oregon, Delaware, and Montana. See 28 U.S.C. 3704.

PASPA grants enforcement authority to both the "Attorney General of the United States" or "a professional sports organization or amateur sports organization whose competitive game is alleged to be the basis of such violation." Enforcement of PASPA is accomplished by means of an injunction from "an appropriate district court of the United States." 28 U.S.C. 3703. In this case it is the Leagues, not the Attorney General, that are enforcing PASPA.

1. Giving PASPA its most natural construction, it is unconstitutional. While Congress has the power to regulate interstate commerce, Congress has *never* had the power to regulate the State's regulation of

interstate commerce. By creating two sovereign governments, the Constitution gives Congress limited enumerated powers to regulate the people directly, but has not empowered Congress to compel the States or state officials to regulate the people. *Nat'l Fed'n of Indep. Bus.* v. *Sebelius*, 567 U.S. 519 (2012); *Printz* v. *United States*, 521 U.S. 898 (1997); *New York* v. *United States*, 505 U.S. 144 (1992). The "Constitution has *never* been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions." *New York*, 505 U.S. at 162 (emphasis added) (citing *Coyle* v. *Smith*, 221 U.S. 559 (1911)). Nor may Congress indirectly coerce "a State to adopt a federal regulatory system as its own." *Sebelius*, 567 U.S. at 578.

The structural federalism embodied in the Constitution protects liberty, preserves the autonomy of the States to guard against abuses by the National Government, and promotes political accountability. It applies whether Congress commands the States to enact new laws or maintain existing laws. It applies whether Congress uses the language of command or the language of prohibition. It applies whether Congress attempts to prevent the States from repealing all or any part of a state law prohibition of private conduct. A congressional command is a command, regardless of its form or phraseology.

The States have reserved sovereign powers under the Tenth Amendment to decide for themselves what they choose not to prohibit. New Jersey acted well within its Tenth Amendment sovereign rights in 2014

by repealing its laws prohibiting sports gambling at certain venues – casinos, current racetracks, and former racetrack racecourses.

PASPA is an unconstitutional anachronism. It was conceived, debated, and drafted during a brief era, marked by this Court's decision in *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985). *Garcia* left to the political process the protection of federalism and state sovereign rights under the Tenth Amendment. Because PASPA commands New Jersey to maintain an anti-sports betting body of law, it violates the Tenth Amendment and structural federalism.

2. Although the most natural reading of the text of PASPA is that it commandeers the States, this Court may be able to avoid deciding whether PASPA is constitutional or not. PASPA may be susceptible of a reasonable construction that would permit a State to repeal any part of a state law prohibition against sports gambling. PASPA only bars States from authorizing sports gambling "by law." If a State has repealed any part of its sports gambling prohibition, there is no applicable state "law" authorizing sports gambling. In that case, the freedom to engage in sports gambling would derive not from a state "law" but from the inherent right of the people to do that which is not prohibited.

Whether PASPA is unconstitutional under its most natural construction or PASPA is given an avoidance construction that allows States to repeal their

sports betting prohibitions, in whole or in part, New Jersey's 2014 Repealer is valid.

ARGUMENT

I. Under Its Most Natural Construction PASPA Is Unconstitutional And New Jersey's 2014 Repealer Is Valid.

A. The Text And Structure Of The Constitution Demonstrate That Congress Has Never Had The Power To Regulate State Governments' Regulation Of Interstate Commerce.

The Commerce Clause provides that Congress "shall have power * * * to regulate commerce * * * among the several states." U.S. Const. Art. I, § 8. By its terms, the Commerce Clause "authorizes Congress to regulate interstate commerce directly; it does not authorize Congress to regulate state governments' regulation of interstate commerce." *New York* v. *United States*, 505 U.S. 144, 166 (1992).

This distinction is mirrored in other enumerated powers given to Congress in Article I,[9] and reflects the

[9] Congress, for example, has the "power to lay and collect taxes," but not the power to requisition funds from the States and command them to impose taxes. U.S. Const. Art. I, § 8. See, *e.g.*, Michael Klarman, *The Framers' Coup: The Making of the United States Constitution* 148 (2016) ("The consensus among delegates for empowering Congress to levy taxes – rather than simply requisition funds – which would obviate the need for a power to coerce states, was so strong that little discussion was devoted to the

overall structure of the Constitution. The National Government is empowered to regulate the people directly, but not indirectly through the States.

This was no accident. The Framers knew that the Articles of Confederation authorized Congress to make demands on the States. They also knew that the Articles provided no mechanism to force the States to comply with these demands. See, *e.g.*, Articles of Confederation, art. VIII. Solving this problem was crucial to the success of the Nation.

One solution that was considered, but then firmly rejected, was to give the National Government coercive means of enforcing its demands on the States.[10]

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subject."). Similarly, Congress has the power to "provide for the common defense and general welfare of the United States," U.S. Const. Art. I, § 8, but no power to command the States to spend state money as Congress demands. See, *e.g.*, *Nat'l Fed'n of Indep. Bus.* v. *Sebelius*, 567 U.S. 519, 576-77 (2012) (Roberts, C.J., joined by Breyer and Kagan, JJ.) (noting that because Spending Clause legislation is in the nature of a contract, the "legitimacy of Congress's exercise of the spending power" depends on whether the State voluntarily and knowingly accepts the terms of the contract) (citations omitted).

[10] Under the original Virginia Plan, the National Government would have been given the power "to call forth the force of the Union agst. any member of the Union failing to fulfill its duty under the articles thereof." James Madison, *Notes on the Constitutional Convention* (May 29, 1787), *in* 1 *The Records of the Federal Convention of 1787*, at 21 (Max Farrand ed., rev. ed. 1937). But further discussion led Madison to realize that such a coercive constitutional provision risked civil war. The provision was postponed without dissent. *Id.* at 54 (May 31, 1787). The New Jersey Plan had a similar provision, *id.* at 245 (June 15, 1787), which Hamilton criticized as one that would not only lead to civil war, but to foreign intervention and dissolution of the Union. *Id.* at 285

Madison summarized the rejection of this idea at the Constitutional Convention: "The practicability of making laws, with coercive sanctions, for the States as political bodies, had been exploded on all hands." James Madison, *Notes on the Constitutional Convention* (July 14, 1787), *in* 2 *The Records of the Federal Convention of 1787*, at 9 (Max Farrand ed., rev. ed. 1937).

Instead, the Framers decided the Constitution should confer "upon Congress the power to regulate individuals, not States." *New York* v. *United States*, 505 U.S. 144, 166 (1992). This decision was profound, for it meant that the Constitution had to be made in the name of the people rather than the States, and had to be ratified by the people, assembled in convention, rather than by the state legislatures. U.S. Const. Preamble; U.S. Const. Art. VII.[11] The Constitution thus "created a legal system unprecedented in form and design, establishing two orders of government, each with its own direct relationship, its own privity, its own set

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(June 18, 1787). See also The Federalist No. 20, at 138 (James Madison and Alexander Hamilton) (Clinton Rossiter ed. 1961) (stating that "a sovereignty over sovereigns, a government over governments, a legislation for communities, as contradistinguished from individuals, as it is a solecism in theory, so in practice it is subversive of the order and ends of civil polity").

[11] As a result, "[t]he government of the Union * * * is, emphatically and truly, a government of the people. In form, and in substance, it emanates from them. Its powers are granted by them, *and are to be exercised directly on them*." *M'Culloch* v. *Maryland*, 17 U.S. 316, 404-405 (1819) (emphasis added).

of mutual rights and obligations to the people who sustain it and are governed by it." *U.S. Term Limits, Inc.* v. *Thornton*, 514 U.S. 779, 838 (1995).

A nation in which two sovereign governments are both empowered to operate directly on the people needs a rule of priority to resolve conflicts between the two sets of laws. The traditional default rule would have been that the statute later-in-time prevailed. See Caleb Nelson, *Preemption*, 86 Va. L. Rev. 225, 237 (2000) (citing authorities from Blackstone to Federalist 78). That was unacceptable because it would have failed to overcome the vices of the Articles – at least absent a power in the National Government to veto state legislation, a power the Framers rejected. See *F.E.R.C.* v. *Mississippi*, 456 U.S. 742, 794 (1982) (O'Connor, J., dissenting). Instead, they adopted the Supremacy Clause as a "rule of decision" that "instructs courts what to do when state and federal law clash." *Armstrong* v. *Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1383 (2015).

The Supremacy Clause is "not a source of any federal rights." *Dennis* v. *Higgins*, 498 U.S. 439, 450 (1991). Nor is it an enumerated source of congressional power. See Allison H. Eid, *Preemption and the Federalism Five*, 37 Rutgers L.J. 1, 6-8 (2005) (Supremacy Clause has "no substantive component" and is not a power or means of exercising congressional power). It's merely a rule of priority. The Supremacy Clause in no way alters the fundamental framework that requires the National Government to govern the people directly

as opposed to commanding the States to regulate the people in accordance with Congress's edicts.

The Constitution the Framers wrote *never* gave Congress power to "compel the States to enact or administer a federal regulatory program." *New York* v. *United States*, 505 U.S. 144, 188 (1992). "[T]he Constitution has *never* been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions." *Id.* at 162 (emphasis added). This "is true whether Congress directly commands a State to regulate or indirectly coerces a State to adopt a federal regulatory system as its own." *Nat'l Fed'n of Indep. Bus.* v. *Sebelius*, 567 U.S. 519, 578 (2012). In short, while Congress has the power to regulate commerce directly, it has no constitutional authority to require the States to regulate commerce. The choice to decline to prohibit conduct under state law is one of the powers "reserved to the States respectively" by the Tenth Amendment.

B. Structural Federalism Protects Liberty, Preserves The Autonomy Of States To Guard Against Abuses By The National Government, And Promotes Political Accountability.

The most important value promoted by structural federalism is the protection of liberty. *Gregory* v. *Ashcroft*, 501 U.S. 452, 458-459 (1991) ("In the tension between federal and state power lies the promise of liberty"). "The fragmentation of power produced by the

structure of our Government is central to liberty, and when we destroy it, we place liberty at peril." *Nat'l Fed'n of Indep. Bus.* v. *Sebelius*, 567 U.S. 519, 707 (2012) (joint opinion of Scalia, Kennedy, Thomas, and Alito, JJ., dissenting). Indeed, the Framers considered the structural protections of freedom to be more important than the Constitution's enumeration of protected liberties. *Ibid.*

The liberties protected by our federalism are political and individual. Politically, federalism "allows States to respond, through the enactment of positive law, to the initiative of those who seek a voice in shaping the destiny of their own times without having to rely solely upon the political processes that control a remote central power." *Bond* v. *United States*, 564 U.S. 211, 221 (2011). Individually, federalism "protects the liberty of all persons within a State by ensuring that laws enacted in excess of delegated governmental power cannot direct or control their actions." *Id.* at 222.

Federalism also preserves the States as autonomous political bodies, "not relegated to the role of mere provinces or political corporations." *Alden* v. *Maine*, 527 U.S. 706, 715 (1999). Hamilton expected state legislatures to be "not only vigilant but suspicious and jealous guardians of the rights of the citizens against encroachments from the federal government," and to "constantly have their attention awake to the conduct of the national rulers," making them "ready enough, if anything improper appears, to sound the alarm to the people." The Federalist No. 26, at 172 (Alexander Hamilton) (Clinton Rossiter ed. 1961); see also Akhil Reed

Amar, *Of Sovereignty and Federalism*, 96 Yale L.J. 1425, 1501 (1987) ("At the first sign of a national abuse of power, they could sound a general alarm, communicating information and advice to their constituents and thereby winning their favor.").

"The States are separate and independent sovereigns. Sometimes they have to act like it." *Nat'l Fed'n of Indep. Bus.* v. *Sebelius*, 567 U.S. 519, 579 (2012) (Roberts, C.J., joined by Breyer & Kagan, JJ.). States can't, though, if Congress is allowed to command what conduct they must prohibit under state law. "Congress may not treat state legislatures as its puppets; such legislatures are supposed to be autonomous watchdogs, not wholly subservient lapdogs." Paul Brest, Sanford Levinson, Jack M. Balkin, Akhil Reed Amar & Reva B. Siegel, *Processes of Constitutional Decisionmaking* 866 (2015).

Federalism also promotes political accountability. It does so by ensuring that there are "two distinct and discernable lines of political accountability: one between the citizens and the Federal Government; the second between the citizens and the States." *United States* v. *Lopez*, 514 U.S. 549, 576 (1995) (Kennedy, J., concurring). If Congress wishes to prohibit the people from exercising their liberty, it must do so itself – openly and directly – rather than by coercing the States to prohibit the people from exercising their liberty. Congress must bear the costs, both the political costs of what might prove to be an unpopular law, *New York* v. *United States*, 505 U.S. 144, 168 (1992) (noting

that if "the Federal Government * * * makes the decision in full view of the public, * * * it will be federal officials that suffer the consequences if the decision turns out to be detrimental or unpopular"), and the monetary enforcement costs of investigation and prosecution. *See Printz* v. *United States*, 521 U.S. 898, 922 (1997) ("The power of the Federal Government would be augmented immeasurably if it were able to impress into its service – and at no cost to itself – the police officers of the 50 States.").[12]

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[12] Not surprisingly, given the interconnected structure of a liberty-protecting Constitution, a departure from the required federal structure leads to a departure from the required structure of the National Government itself. If Congress were permitted to require a State to criminalize what Congress commanded the States to criminalize, it could not only commandeer state legislatures and conscript state law enforcement officials, but also bypass the President and the President's officers. *Printz* v. *United States*, 521 U.S. 898, 923 (1997) (noting that "the power of the President would be subject to reduction, if Congress could act as effectively without the President as with him, by simply requiring state officers to execute its laws"). Allowing Congress to bypass the President and impress the States would eliminate the President's important role in "safeguarding state prerogatives from federal encroachment," through the setting of federal enforcement priorities. Robert A. Mikos, *Indemnification As an Alternative to Nullification*, 76 Mont. L. Rev. 57, 67 (2015); see Michael A. Simons, *Prosecutorial Discretion and Prosecution Guidelines: A Case Study in Controlling Federalization*, 75 N.Y.U. L. Rev. 893, 930 (2000) (observing that "the Executive Branch is the best equipped to control federalization" of crime).

Indeed, permitting Congress to command the States to make and enforce law would enable Congress to evade the President's pardon power, the "fail safe" in our criminal justice system. *Herrera* v. *Collins*, 506 U.S. 390, 415 (1993); see *Ex parte Garland*, 71 U.S. 333, 380 (1866) ("This power of the President is not subject

C. A Congressional Command Dictating How A State Must Regulate The Conduct Of Its Citizens Is Unconstitutional, Regardless Of How The Command Is Phrased.

The constitutional limitations upon the power of Congress deprive Congress of "the ability to require the States to govern according to Congress' instructions." *New York* v. *United States*, 505 U.S. 144, 162 (1992). This limitation cannot be evaded by the form or phraseology of Congress's command. Whatever the form or phraseology of the command, the command is still a command.

The following scenarios illustrate why the phraseology or form of a congressional command requiring that States govern according to Congress's instructions has no effect on the constitutional violation.

- **Congressional commands to enact a new law or prohibit expiration of an existing law.** Under *New York* and *Printz*, it's clear that Congress cannot command States to enact a new state law prohibiting conduct that Congress wants prohibited. Similarly, under *New York* and *Printz*, it's clear that Congress cannot prohibit a State from allowing an existing state law to expire by its own

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to legislative control. Congress can neither limit the effect of his pardon, nor exclude from its exercise any class of offenders. The benign prerogative of mercy reposed in him cannot be fettered by any legislative restrictions.").

terms, just as forcing a worker who began his labors voluntarily to continue against his will is still involuntary servitude. Cf. *Bailey* v. *Alabama*, 219 U.S. 219 (1911).

- **Congressional commands prohibiting States from enacting a full or partial repeal of state laws.** A federal law prohibiting "a state from repealing an existing law is no different from forcing it to pass a new one" because "in either case, the state is being forced to regulate conduct that it prefers to leave unregulated." *Conant* v. *Walters*, 309 F.3d 629, 646 (9th Cir. 2002) (Kozinski, J., concurring). "If the federal government could make it illegal under federal law to remove a state-law penalty, it could then accomplish exactly what the commandeering doctrine prohibits: The federal government could force the state to criminalize behavior it has chosen to make legal." *Ibid.*

That States must have the freedom under PASPA and the Constitution to choose whether to repeal a state law, in whole or in part, is a proposition that both the United States and the Leagues have endorsed. See J.A. 197 (the Solicitor General wrote that "New Jersey is free to repeal those prohibitions in whole or in part"). See also J.A. 181 (the United States argued that under PASPA, it is up to the State of New Jersey "*to determine for itself the extent to which it will or will*

not enforce" its sports betting laws) (emphasis added); Leagues C.A. Br., *Christie I*, Case No. 13-1713, 2013 WL 2904907, at *37 (3d Cir. June 7, 2013) (the Leagues wrote that "[n]oticeably absent from [PASPA's] language * * * is any requirement that states enact, maintain, or enforce anything"); *id.* at *16 (the Leagues argued that "nothing in the unambiguous text of PASPA requires states to keep prohibitions against sports gambling on their books").

If Congress had the power under the Commerce Clause to command States to keep in place any prohibition that a State chooses to repeal, in whole or in part, the core values promoted by our federalism would be significantly undermined. As Dean Chemerinsky explained in the marijuana context, "[t]he federal government cannot command any state government to criminalize marijuana conduct under state law. From that incontrovertible premise flows the conclusion that if states wish to repeal existing marijuana laws *or partially repeal those laws*, they may do so without running afoul of federal preemption." Erwin Chemerinsky *et al.*, *Cooperative Federalism and Marijuana Regulation*, 62 UCLA L. Rev. 74, 103 (2015) (footnote omitted) (emphasis added).

- **Affirmative or negative phrasing of a congressional command.**

Whether Congress phrases its command to States affirmatively or negatively, the constitutional violation is the same. It is difficult to imagine that *New York* would have been decided differently if Congress, instead of affirmatively commanding the States to take title, had instead phrased its command as a prohibition against States allowing anyone, other than the State itself, to hold title to radioactive waste. In either case the constitutional violation is the same.

It is just as unfathomable that *Printz* would have been decided differently if Congress, instead of affirmatively commanding local law enforcement officials to conduct background checks before issuing gun permits, had instead prohibited States from issuing gun permits without local law enforcement first completing background checks. Again, the resulting constitutional violation is the same.

Indeed, when this Court in *New York* explained that the constitutional principles it was applying "were not innovations," and that "the Constitution has *never* been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions," it relied on its 1911 decision in *Coyle* v. *Smith*, 221 U.S. 559 (1911). *New*

> *York* v. *United States*, 505 U.S. 144, 162 (1992) (emphasis added). *Coyle*, itself, involved a command from Congress to States that was phrased in the negative. In *Coyle*, the Court found unconstitutional an Act of Congress commanding that a state capital "shall *not* be changed." *Coyle*, 221 U.S. at 564 (quoting the statute) (emphasis added).

A distinction resting on the form or phraseology of a congressional command, rather than the unconstitutional consequences of the command, is a distinction without a difference, would gut the principles recognized in *New York*, *Printz*, and *Sebelius*, and allow for easy evasion of the anti-commandeering doctrine. Cf. *Printz*, 521 U.S. at 935 (holding that Congress "cannot circumvent" the prohibition recognized in *New York*). Whether Congress tries to coerce States by prohibiting the removal of state law prohibitions, by prohibiting States from acting, or by prohibiting complete or partial repeals of state laws, Congress has no authority to command a State "to adopt a federal regulatory system as its own." *Nat'l Fed'n of Indep. Bus.* v. *Sebelius*, 567 U.S. 519, 578 (2012). "It is the very *principle* of separate state sovereignty that such a law offends." *Printz* v. *United States*, 521 U.S. 898, 932 (1997).[13]

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[13] As Judge Vanaskie has explained, PASPA is markedly different from constitutionally-permissible exercises of Congressional power seen in cases like *Hodel* v. *Virginia Surface Min. & Reclamation Ass'n, Inc.*, 452 U.S. 264 (1981), and *F.E.R.C.* v. *Mississippi*, 456 U.S. 742 (1982). In those cases, Congress provided that States were free to either regulate the people as Congress

D. As Most Naturally Construed, PASPA Directly Commands States To Prohibit Sports Betting And Is, Therefore, Unconstitutional.

PASPA makes it "unlawful" for a "governmental entity to * * * authorize by law or compact" sports gambling. 28 U.S.C. 3702. It commands the States, under pain of injunctive relief, 28 U.S.C. 3703, not to authorize sports gambling by law.

As a matter of common usage, to "authorize" is to "give permission for," American Heritage Dictionary of the English Language 121 (4th ed. 2000), or to "give official approval to or permission for," Webster's New World Dictionary 92 (3d college ed., 1993). The sixth edition of Black's Law Dictionary similarly defines "authorize" as to "permit a thing to be done in the future."

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wanted or stand aside and let the national government regulate the people itself. Pet. App. 41a (Vanaskie, J., dissenting) (noting that States "may either comply with the federal legislation *or the Federal Government will carry the legislation into effect*").

Similarly, PASPA is quite unlike *de*regulatory Congressional acts, such as the Airline Deregulation Act involved in *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 378-379 (1992), where Congress permissibly provided the people with market freedom and blocked the States from interfering with that freedom. Pet. App. 190a (Vanaskie, J., dissenting) (noting that "if Congress chooses to regulate (or deregulate) directly, it may require states to refrain from enacting their own regulations that, in Congress's judgment, would thwart its policy objectives").

Finally, PASPA is notably distinct from cases like *South Carolina* v. *Baker*, 485 U.S. 505 (1988), and *Reno* v. *Condon*, 528 U.S. 141 (2000), where Congress regulated the States' own activities, not the States' regulation of private parties. Pet. App. 42a-43a (Vanaskie, J., dissenting).

Black's Law Dictionary 133 (6th ed. 1990); see also *ibid.* ("'Authorized' is sometimes construed as equivalent to 'permitted.'"). Since States are commanded by PASPA not to permit sports gambling, then, logically, they are being commanded by PASPA to prohibit it. In so doing, PASPA puts a gun in the hands of private sports organizations, such as the Leagues, granting to them the unfettered discretionary power to target enforcement of PASPA against private parties, such as the NJTHA, sovereign States like New Jersey, or both. See *Nat'l Fed'n of Indep. Bus.* v. *Sebelius*, 567 U.S. 519, 581 (2012) (Roberts, C.J., joined by Breyer & Kagan, JJ.) ("In this case, the financial 'inducement' Congress has chosen is much more than 'relatively mild encouragement' – it is a gun to the head.").

PASPA was conceived and drafted during the brief era when this Court left the protection of state sovereignty to the political process. "State sovereign interests," this Court held in 1985, "are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power." *Garcia* v. *San Antonio Metro. Transit Auth.*, 469 U.S. 528, 551 (1985). In dissent, Justice O'Connor lamented the Court's abdication of its constitutional responsibility, and wrote that "the States *as States* have legitimate interests which the National Government is bound to respect." *Id.* at 581 (O'Connor, J., joined by Powell & Rehnquist, JJ., dissenting). Justice O'Connor accurately predicted

that this Court would "in time again assume its constitutional responsibility." *Id.* at 589 (O'Connor, J., joined by Powell & Rehnquist, JJ., dissenting).

Legislative work on PASPA began in the late 1980s. The Senate Judiciary Committee produced its report on PASPA in 1991. See Professional and Amateur Sports Protection Act, S. Rep. No. 248, 102nd Cong., 1st Sess. (1991). The Senate passed PASPA on June 2, 1992, prior to this Court's decision later that month in *New York* v. *United States*.

When Congress passed PASPA,[14] it showed no constitutional scruples about commandeering the States, thereby failing to live up to the trust this Court had placed in Congress in *Garcia*. See *United States* v. *Lopez*, 514 U.S. 549, 577-78 (1995) (Kennedy, J., concurring) (emphasizing that while "it would be mistaken and mischievous for the political branches to forget that the sworn obligation to preserve and protect the Constitution in maintaining the federal balance is their own in the first and primary instance * * * the absence of structural mechanisms to require those officials to undertake this principled task, and the momentary political convenience often attendant upon

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[14] The relevant dates of PASPA's passage are as follows: On June 2, 1992, the Senate considered and passed PASPA. On October 5, 1992, the House considered, amended, and passed PASPA. On October 7, 1992, the Senate concurred in the House amendments. On October 28, 1992, PASPA was approved by the President. The effective date of PASPA is January 1, 1993.

their failure to do so, argue against a complete renunciation of the judicial role").

The primary sponsors of the bill were clear in their belief that they could command States to prohibit sports betting. Senator DeConcini said, "I make no bones about it[.] * * * Except for certain States, sports gaming in amateur and professional sports will be barred. * * * I would like to have it effective *on* all 50 States but that is not in the cards." 138 Cong. Rec. S7274-02, at S7279-80, 1992 WL 116822 (daily ed. June 2, 1992) (statement of Sen. DeConcini) (emphasis added). Senator Bradley explained that PASPA "prohibited" a State "from allowing sports betting." 138 Cong. Rec. S17434-01, at S17435, 1992 WL 275344 (daily ed. Oct. 7, 1992) (statement of Sen. Bradley). Indeed, the formal title of the bill – as opposed to the short title by which the Act "may be cited" according to section 1 of the Act – when first passed by the Senate was "An Act to prohibit sports gambling under State law." S. 474, 102nd Cong., 2d Sess. (as passed by Senate, June 2, 1992). The House later changed the formal title to "An Act to prohibit sports gambling under State law, and for other purposes" (S. 474, 102nd Cong., 2d Sess. (as amended by House, Oct. 5, 1992)), which remained the formal title of the bill when ultimately enacted into law. Pub. L. No. 102-559, 106 Stat. 4227 (1992); see p. 3, *supra*.

Because the most natural construction of PASPA is that it is a direct command to States to prohibit

sports betting, no matter what the people or lawmakers of a State may want, it is obviously unconstitutional under this Court's precedents in *New York* and *Printz*. This was how Judge Vanaskie would have resolved the issue four years ago. He wrote: "By prohibiting states from licensing or authorizing sports gambling, PASPA dictates the manner in which states must regulate interstate commerce and thus contravenes the principles of federalism set forth in *New York* and *Printz*." Pet. App. 187a (Vanaskie, J., dissenting). Time and intervening circumstances have vindicated Judge Vanaskie's straightforward analysis. Pet. App. 35a-36a (Vanaskie, J., dissenting) (noting that his skepticism about the decision in *Christie I* was validated and reiterating, "Because I believe that PASPA was intended to compel the States to prohibit wagering on sporting events, it cannot survive constitutional scrutiny.").[15]

E. The District Court's Injunction Confirms How, In Practice, PASPA Unconstitutionally Commandeers State Legislative And Executive Sovereign Functions.

The en banc majority thought PASPA was "distinguishable from the law at issue in *New York* because it

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[15] Before this litigation, no one ever suggested that PASPA permitted States (other than the favored exempt States) to allow any amount of sports gambling. It was only when the Leagues sought some way to avoid the otherwise inevitable conclusion of PASPA's unconstitutionality that various other constructions were invented in attempts to save it.

does not require states to take any action." Pet. App. 25a. Quoting from *Christie I*, the en banc majority wrote that "PASPA does not *require* or coerce the states to lift a finger." *Ibid.* This is wrong. The en banc majority fails to take into account the coercive force of the district court's injunction that the en banc majority affirmed.

The district court injunction, obtained at the behest of the Leagues (not the United States), conscripts New Jersey's law enforcement officers to enforce a federal mandate. But the injunction does not enjoin the NJTHA. It only enjoins the State Defendants from "giving operation or effect to the 2014 [Repealer]." Pet. App. 113a; see also *id.* at 92a n.7 ("no injunction is being entered against the NJTHA").

Because the State Defendants are enjoined from "giving operation or effect" to the 2014 Repealer, they must continue to treat New Jersey's repealed sports betting prohibitions as if they are still in full force and effect. If the NJTHA were to begin to offer sports betting at Monmouth Park then it, its members, and the Park's employees would not be in violation of the district court's injunction because none of them are enjoined. Pet. App. 113a; *id.* at 92a n.7. But, all of them would be in violation of every *state* criminal and civil law prohibiting sports gambling, even though all of those laws were repealed at Monmouth Park by the State Legislature.[16]

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[16] The 2014 Repealer repealed provisions in New Jersey's criminal code (N.J. Stat. Ann. § 2C:37-1 *et seq.*), civil code (N.J.

If Monmouth Park conducted sports betting, the NJTHA members and Monmouth Park employees would be subject to arrest and hauled into *state* court by federally conscripted *state* executive officials, who have been compelled to enforce a federal command by federal injunction, obtained at the behest of the Leagues, to give effect to a repealed state law. And, if the state officials refused to make the arrests required by the federal injunction they would be subject to being hauled into *federal* court by the Leagues for their failure to obey an injunction requiring them to bring the *state* law prosecution under the repealed *state* laws in *state* court.[17]

This is absurd on every level. Yet, this is the reality that has confronted, and continues to confront, the NJTHA. It is a blatant abridgement of liberty. This isn't permissible congressional encouragement. It's impermissible coercion, at least as coercive – if not more so – as what the Court found unconstitutional in *Printz*. As this Court has held, see, *e.g.*, *New York* and *Printz*, the federal government commanding and dragooning state lawmakers and executive branch officers to coerce the people of their State to serve a federal purpose is precisely the kind of federal coercion that

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Stat. Ann. § 2A:40-1 *et seq.*), and other laws regulating sports betting. Criminal penalties for violating state laws prohibiting sports gambling include incarceration and fines. See pp. 12-13, *supra*.

[17] Would it be contempt for the Governor to issue a pardon or proclaim an amnesty? If so, PASPA would have resulted in eliminating not only the President's pardon power, but the Governor's as well.

the Framers considered, debated, and rejected some 230 years ago.

F. PASPA Significantly Reduces Congress's Political Accountability.

PASPA allows Congress to escape political accountability for its actions, both as to the policies underlying PASPA and PASPA's associated costs. The Congressional Budget Office, for example, estimated that "no cost to the federal government would result from enactment," of PASPA and that it "would not affect direct spending or receipts." S. Rep. No. 248, 102nd Cong., 1st Sess. 10 (1991). As a result, "pay-as-you-go procedures" did not apply. *Ibid.*

If Members of Congress had sought to enact a law making sports gambling a federal crime, rather than commanding the States to keep state criminal laws prohibiting sports gambling in place, they would have had to personally confront the costs of federal investigations and prosecutions. They also would have been accountable to the public for the political fallout from enacting an increasingly unpopular law.[18] Indeed, the en banc majority acknowledged that PASPA is a controversial law, "not without its critics," considered "unwise" by some, and "criticized for encouraging the

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[18] The Commissioner of the NBA, Adam Silver, has recognized that "[g]ambling has increasingly become a popular and accepted form of entertainment in the United States," and that "some estimate that nearly $400 billion is illegally wagered on sports each year." See J.A. 351.

spread of illegal sports gambling[19] and for making it easier to fix games." Pet. App. 11a. But PASPA allows Congress to escape accountability for its actions and to pass those costs on to the States.

PASPA further distances Congress from any accountability by vesting private organizations, like the Leagues, with the discretionary power to enforce its provisions against whomever the Leagues choose.[20] 28 U.S.C. 3703. So, not only did Congress shift to the States the obligation to prohibit sports betting, it also avoided any federal cost of ensuring compliance with PASPA's provisions by granting authority to the Leagues to seek an injunction to force the States to prohibit sports betting. Cf. *Linda R.S.* v. *Richard D.*, 410 U.S. 614, 619 (1973) (noting that "in American jurisprudence at least, a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another").

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[19] Since PASPA's enactment, trillions of dollars have been wagered illegally on sporting events. In 2016 alone, Americans wagered an estimated $154 billion on all sports, nearly all of it through bookies and offshore, illicit web sites. *Super Bowl 51 – By The Numbers*, American Gaming Association (Jan. 31, 2017), https://americangaming.org/research/infographics/super-bowl-51-numbers. In the last Super Bowl alone, $4.7 billion was estimated to be wagered, and approximately 97% of those bets were made illegally. *Ibid.*

[20] Before PASPA became law, the Department of Justice wrote in 1991 that PASPA "raises federalism issues" and that "[i]t is particularly troubling that [PASPA] would permit enforcement of its provisions by sports leagues." Pet. App. 225a.

Vesting the Leagues with the discretionary power to enforce PASPA not only shields Congress from accountability but also poses a danger of arbitrary and unpredictable enforcement. Under Section 3703 of PASPA, the Leagues can pick and choose when they wish to enforce PASPA, and when to turn a blind eye to violations of PASPA. This is exactly what the Leagues have done here.

The United States is not seeking to enforce PASPA against the NJTHA. It's not even a party to this action. Cf. *Alden v. Maine*, 527 U.S. 706, 759-60 (1999) (noting the constitutional difference between an action by the United States and an action brought by a private party and noting that the United States apparently found its interests "insufficient to justify sending even a single attorney * * * to prosecute this litigation").

At the same time as the Leagues have aggressively deployed, under the guise of protecting the integrity of their games and the games of others, their resources to block the NJTHA from conducting sports wagering, they are reaping profits from Fantasy and DFS derived from bets on the performances of players in the Leagues' games and the games of others. The Leagues' full-throated endorsement of Fantasy and DFS demonstrates the pernicious consequences that can follow when Congress tries to avoid political accountability for its actions by granting discretionary enforcement powers to private persons who may have self-interests that are at odds with a statute's, such as PASPA's, purposes. The Leagues, thus, hypocritically stand before this Court profiting from an activity that

PASPA expressly prohibits while at the same time using PASPA to stop the NJTHA from operating a sports betting venue at Monmouth Park that has the potential to save jobs, save the New Jersey equine industry, and preserve open spaces.[21]

G. PASPA Abridges Liberty.

In November, 2011, New Jersey voters, by a margin of 2-1, exercised their political liberty by approving a referendum to amend their state constitution. They exercised their political liberty again to convince the legislature to pass bills in 2012, and yet again in 2014. So far, these exercises of political liberty – reflecting the choices, hopes, wishes, and desires of the people of New Jersey – have been all for naught because of PASPA.

PASPA's commands to New Jersey significantly burden the liberty of everyone associated with Monmouth Park and New Jersey's entire equine industry. If employees at Monmouth Park conduct sports betting, they are at risk of imprisonment and fines for violating state criminal laws prohibiting sports gambling (see pp. 12-13, *supra*), even though the State Legislature has repealed those laws. Moreover, Monmouth Park's employees (everyone from clerks to parking attendants, from table servers to security guards, and from ushers to racing officials) have for years lived under the threat of Monmouth Park closing down because

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[21] See pp. 9-12, *supra*.

without sports betting, the economic viability of Monmouth Park as a self-sustaining thoroughbred racetrack is in jeopardy. And the choices, hopes, wishes, and desires of the NJTHA's more than 3,000 members to save Monmouth Park and New Jersey's equine industry by establishing a sports betting venue at Monmouth Park have been stonewalled because of PASPA.

H. The En Banc Majority's Construction Of PASPA Is Unreasonable And, In Any Event, Doesn't Save PASPA's Constitutionality.

In attempting to both save the constitutionality of PASPA and hold that New Jersey is prohibited from selectively repealing state law prohibitions against sports gambling, the en banc majority has created an unnatural and illogical construction of PASPA. In any event, the en banc majority's construction does not save PASPA's constitutionality.

1. The en banc majority prefaced its construction of PASPA by saying "we are duty-bound to interpret the text of the law as Congress wrote it," Pet. App. 12a, and cited to the dictionary definition of "authorize." *Id.* at 13a. But the en banc majority also surely recognized that if PASPA prohibits New Jersey from authorizing *any* sports gambling, then it is commanding New Jersey to prohibit sports gambling – an act of Congress that is plainly unconstitutional under *New York*, *Printz*, and *Sebelius*. As a result, the en banc majority did not "interpret the text of the law as Congress wrote

it," but instead radically departed from it and came up with an interpretation that seeks to avoid the constitutional problem. But the en banc majority construction is a most unnatural – and, indeed, an unreasonable – construction. It also fails to avoid the constitutional problem.

The en banc majority reasoned that because the 2014 Repealer does not repeal *all* sports gambling prohibitions, New Jersey thereby authorized by law the sports betting activities that it no longer prohibited. Pet. App. 12a-13a ("[T]he 2014 Law authorizes casinos and racetracks to operate sports gambling while other laws prohibit sports gambling by all other entities. * * * Absent the 2014 Law, New Jersey's myriad laws prohibiting sports gambling would apply to casinos and racetracks."). The en banc majority found there was authorization by law because the State "selectively" lifted its prohibition on sports gambling; such "selectiveness constitutes specific permission and empowerment." *Id.* at 13a. Judge Fuentes described the en banc majority's construction this way: "According to the majority, the 'selective' nature of the 2014 Repeal *amounts to* 'authorizing by law' a sports wagering scheme. That is, because the State retained certain restrictions on sports betting, the majority *infers* the authorization by law." Pet. App. 28a (Fuentes, J., dissenting).

The logical conclusion of the reasoning that selective repeal of some sports gambling prohibitions is an authorization by law under PASPA is that PASPA leaves the States a binary choice of repealing *all* or

none of its prohibitions on sports gambling. Indeed, this is how the district court construed PASPA. See Pet. App. 105a ("In this Court's view * * * PASPA preempts the type of *partial repeal* New Jersey is attempting to accomplish in the 2014 Law, by allowing some, but not all, types of sports wagering in New Jersey, thus creating a label of legitimacy for sports wagering pursuant to a state scheme.").

But the en banc majority declined to follow the district court and declined to follow the logic of its own reasoning to conclude that PASPA gives the States a "strict binary choice between total repeal and keeping a complete ban on their books." Pet. App. 24a. It evidently understood that such a "coercive binary choice" (*id.* at 23a) would also be unconstitutional. It, therefore, accepted what "the Leagues noted at oral argument": that "not all partial repeals are created equal." *Id.* at 24a.

According to the en banc majority, some partial repeals are theoretically so small and allow so little sports gambling that they don't count as authorizations, and therefore don't violate PASPA. Pet. App. 24a ("For instance, a state's partial repeal of a sports wagering ban to allow *de minimis* wagers between friends and family would not have nearly the type of authorizing effect that we find in the 2014 Law."). And some partial repeals are so large and allow so much sports gambling that they are insufficiently selective to count as an authorization, and therefore don't violate PASPA. As the Leagues put it at oral argument before the en banc court, a repeal begins to be large enough

to not constitute an authorization when it allows "around 50%." Oral Argument Before En Banc Third Circuit, *Nat'l Collegiate Athletic Ass'n* v. *Governor of the State of N.J.*, No. 14-4546 (3d Cir. Feb. 17, 2016) at approximately 38 minutes:30 seconds.[22]

Why PASPA is said to exempt sports bets that are *de minimis* or made by those in a familial/friendly relationship is left wholly unexplained. Why PASPA bars state law repeals of *less* than 50% while allowing state law repeals of *more* than 50% is anyone's guess.

The en banc majority's rewrite of PASPA is reminiscent of the proposition that sometimes lawmakers will permissibly seek a "Goldilocks solution – not too large, not too small, but just right." *Arizona Free Enter. Club's Freedom Club PAC* v. *Bennett*, 564 U.S. 721, 760 (2011) (Kagan, J., dissenting). But the way in which the en banc majority rewrote PASPA is the inverse of a Goldilocks solution: it would be as if Goldilocks were happy sitting in an oversized chair (such as Edith Ann's rocking chair) or in a teeny chair (such as the ones in Derek Zoolander's children's center), but not in anything between these two extremes.

The en banc majority's rewrite of PASPA does not say where to draw the shifting lines between the amounts or kind of sports betting that is and is not permitted by PASPA. The rewrite provides no principle to

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[22] A recording of this en banc oral argument can be accessed on the Third Circuit's website. See http://www.ca3.uscourts.gov/oral-argument-recordings. It is the second of the two recordings on the Third Circuit's website for Case No. 14-4546.

guide the line drawing. The en banc majority even confessed that it may not be possible to draw a line separating PASPA compliance by States from non-compliance by States. Pet. App. 24a.

It is difficult to see where a principle would come from to determine what is small enough to be permissible and what is large enough to be permissible under PASPA. But even if such lines could be drawn in a principled way, the en banc majority's construction of PASPA produces the bizarre result that once a State passes the *de minimis* threshold, the *more* a State allows sports gambling, the *closer* it comes to compliance with PASPA. If allowing sports gambling in two of New Jersey's twenty-one counties were found to be too selective and thus on the prohibited side of the PASPA compliance line, allowing it in ten counties would move New Jersey closer to compliance with PASPA; if ten were not enough, allowing it in fifteen would be a step in the compliance direction; if fifteen were not enough, allowing it in twenty might be.

Senators Bradley and DeConcini reluctantly accepted the necessity of exempting States that already allowed sports gambling in order to get the bill passed. They wanted to command every State to prohibit sports betting, including Nevada. Congress, for obvious reasons, was not going to command Nevada to halt sports betting. But under the en banc majority's construction, the more locations where New Jersey allows sports gambling, the closer New Jersey comes to compliance with PASPA.

Is it imaginable that PASPA's sponsors would have supported PASPA if it clearly said what the en banc majority now says PASPA means – that allowing *more* sports betting can move a State *closer* to compliance with PASPA? If a State does not allow *enough* sports betting is it in violation of PASPA? No support for such a statute could come from a reasonable legislator pursuing reasonable ends reasonably.[23] While the en banc majority may have started out with the intent to give PASPA's text a natural construction, it ended up radically departing from the text by rewriting the statute to give it a most unnatural construction.

2. Even if the en banc majority's construction of PASPA was reasonable, it fails to save PASPA's constitutionality for two reasons.

First, Congress simply has no power to tell States that they cannot repeal a state prohibition on private conduct. See *New York*, *Printz*, and *Sebelius*. No matter how little or how much of a state law prohibition on private conduct a State chooses to repeal, Congress cannot command States to prohibit what States don't want to prohibit.

Second, the kind of choice offered by PASPA, as construed by the en banc majority, is itself unconstitutionally coercive. A reasonable federal lawmaker pursuing legitimate ends through legitimate means would not offer States a choice between 1) restricting something the way the federal lawmaker wants it restricted

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[23] Henry M. Hart, Jr. & Albert M. Sacks, *The Legal Process* 1378 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

and 2) leaving it very largely *un*restricted – but a federal lawmaker looking to coerce States might make such an offer, because it was an offer that States couldn't refuse.

Imagine if the en banc majority's approach to PASPA were applied to a statute seeking to manage or limit radioactive waste: Congress commands a State to prohibit the possession of radioactive waste by everyone (except the State itself) – but, if the State doesn't want to do that, the State must then allow enough people in enough places in the State to do whatever they want with nuclear waste. Would that statute be constitutional?

Or, imagine the same approach applied to a statute intended to improve gun control: Congress tells a State that it must prohibit the sales of guns unless there is a background check by local law enforcement officials – but, if the State doesn't want to do that, the State must allow enough people in enough places in the State to do whatever they want in connection with the purchase of guns. Would that statute be constitutional?

Or imagine the same approach applied to air and water pollution: Congress tells a State that it must regulate pollution the way Congress dictates – but, if the State doesn't want to do that, the State must allow enough people in enough places in the State to do whatever they want to pollute the air and the water. Would that statute be constitutional?

If States are to remain autonomous sovereigns rather than coerced subjects, the answer to these questions must be no.

II. PASPA May Be Susceptible Of A Reasonable Construction That Does Not Prohibit New Jersey's 2014 Repealer And Avoids The Need To Decide The Constitutional Question.

There is another way to decide this case. This Court can avoid deciding the constitutional question by construing PASPA to allow the States to repeal sports betting prohibitions, in whole or in part. Although construing PASPA this way is not the most natural construction of PASPA, such an approach has been championed by Judge Fuentes, and, at times, advocated by the United States as well as by the Leagues.[24] The Court may determine that PASPA is susceptible of such construction and, if so, it avoids the need to decide the constitutional question.

This Court has long held that in the "prudent exercise" of its jurisdiction, it "will not decide a constitutional question if there is some other ground upon which to dispose of the case." *Bond* v. *United States*, 134 S. Ct. 2077, 2087 (2014) (internal quotation marks and citation omitted); *Ashwander* v. *Tennessee Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring). This principle is "sometimes lumped together" with the constitutional-doubt canon, and jointly dubbed the "rules of constitutional avoidance." Antonin Scalia

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[24] See pp. 27-28, *supra*.

and Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 251 (2012).

The constitutional-doubt canon teaches that if "an otherwise acceptable construction of a statute would raise serious constitutional problems," but the statute is "open to a construction that obviates deciding" the constitutional question, the Court will adopt the construction that avoids the constitutional question. *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Bldg.*, 485 U.S. 568, 575, 578 (1988). Thus, "[w]hen the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Ashwander* v. *Tennessee Valley Auth.*, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring) (internal quotation marks and citation omitted).

The doctrine of constitutional doubt allows the Court to adopt a construction of a statute that is not the most preferred one but which, nonetheless, is a reasonable one. As Justice Scalia explained:

> "The doctrine of constitutional doubt does not require that the problem-avoiding construction be the *preferable* one – the one the Court would adopt in any event. Such a standard would deprive the doctrine of all function. 'Adopt the interpretation that avoids the constitutional doubt if that is the right one' produces precisely the same result as 'adopt the right interpretation.' Rather, the doctrine of

> constitutional doubt comes into play when the statute is 'susceptible of' the problem-avoiding interpretation, [*United States ex rel. Attorney Gen.* v.] *Delaware & Hudson Co.*, 213 U.S. [366 (1909)] at 408 – when that interpretation is *reasonable*, though not necessarily the best." *Almendarez-Torres* v. *United States*, 523 U.S. 224, 270 (1998) (dissenting opinion).

Feltner v. *Columbia Pictures Television, Inc.*, 523 U.S. 340, 358-59 (1998) (Scalia, J., concurring in the judgment).

Apart from the canon of constitutional doubt, a statute "must be read consistent with principles of federalism inherent in our constitutional structure." *Bond* v. *United States*, 134 S. Ct. 2077, 2088 (2014). Congress must speak clearly before this Court will conclude that an Act of Congress has "significantly changed the federal-state balance." *United States* v. *Bass*, 404 U.S. 336, 349 (1971).

"[I]f the Federal Government would radically readjust the balance of state and national authority, those charged with the duty of legislating must be reasonably explicit about it." *Bond*, 134 S. Ct. at 2089 (internal quotation marks and citation omitted); see also *Gregory* v. *Ashcroft*, 501 U.S. 452, 460 (1991) (noting that "it is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides" the "usual constitutional balance of federal and state powers") (internal quotation marks and citation omitted). The clear statement rule "assures that the legislature has in fact faced, and intended to bring

into issue, the critical matters involved in the judicial decision." *Bass*, 404 U.S. at 349.

The decision in *Bond* v. *United States*, 134 S. Ct. 2077 (2014), is illustrative. In *Bond*, this Court, in an opinion for six Justices, held that a federal statute criminalizing the use of chemical weapons did not apply to "an amateur attempt by a jilted wife to injure her husband's lover." *Id.* at 2083. It reached this conclusion even though she used chemicals that "are toxic to humans and, in high enough doses, potentially lethal," and despite an expansive statutory definition that included "[a]ny chemical which through its chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals," other than those used for "peaceful purposes." *Id.* at 2084-85.

Three Justices concluded that the statute was clear, not susceptible of a construction that avoided the constitutional question, and therefore that it was necessary to decide the constitutional question. *Bond*, 134 S. Ct. at 2098 (Scalia, J., joined by Thomas, J., concurring in the judgment) ("Since the Act is clear, the *real* question this case presents is whether the Act is constitutional as applied to petitioner."); *Bond*, 134 S. Ct. at 2111 (Alito, J., concurring in the judgment) (agreeing with Justice Scalia's statutory analysis and "therefore find[ing] it necessary to reach the question whether this statute represents a constitutional exercise of federal power").

The majority in *Bond* believed the statute was not clear and, thus, susceptible of a construction that avoided reaching the constitutional question. As the majority saw it, the disagreement between the six in the majority and their three colleagues concurring in the judgment came down to whether the statute was "utterly clear." *Bond*, 134 S. Ct. at 2093. The three Justices concurring in the judgment found the statute to be "utterly clear." *Id.* at 2096 (Scalia, J., concurring). The majority disagreed. *Id.* at 2093.

This Court may determine that PASPA can reasonably be construed to permit States to repeal some or all of their laws prohibiting sports gambling. This is not the most natural construction of PASPA, but the Court may find it to be a permissible construction.

On this constitutional avoidance construction, nothing in PASPA "requires that the states keep any law in place." Instead, because PASPA speaks not of authorization simpliciter, but of authorization "by law," a State that repeals a state law prohibition has no relevant "law" in place. As a result, the State is not authorizing the formerly-prohibited act "by law." Pet. App. 158a-159a.

When in 2014 the New Jersey Legislature repealed its prohibitions on sports gambling at certain locations, the result, on this view, did not violate PASPA because "with respect to those locations," the "previous prohibitions on sports betting" are "nonexistent," "there are no laws governing sports wagering," and "permission to engage in such an activity is

not affirmatively granted *by virtue of* it being prohibited elsewhere." Pet. App. 28a, 31a (Fuentes, J., dissenting). Under this construction of PASPA, it is false to treat as equivalent (1) a repeal, in whole or in part, and (2) an authorization "by law," because "[t]he right to do that which is not prohibited derives not from the authority of the state but from the inherent rights of the people." Pet. App. 159a.

There are two additional textual reasons that can support this construction of PASPA. First, PASPA's prohibitions against "licens[ing]" and "authoriz[ation] by law" do not stand alone, but are in a list with "sponsor, operate, advertise, [and] promote." 28 U.S.C. 3702(1). The canon of *noscitur a sociis* "counsels that a word is given more precise content by the neighboring words with which it is associated." *United States* v. *Williams*, 553 U.S. 285, 294 (2008). The words "sponsor, operate, advertise, [and] promote," suggest active state involvement. The Court, therefore, in an effort to avoid deciding the constitutional issue, might conclude that it is reasonable to read "license" and "authorize by law" in PASPA to require a similarly active level of state involvement in sports gambling that does not include repeals, whether in whole or in part.

Second, PASPA prohibits a person from sponsoring operating, advertising, or promoting sports gambling "pursuant to the law or compact of a governmental entity." 28 U.S.C. § 3702(2). Because a person who acts in the absence of any government prohibition would not be described as acting "pursuant to law,"

this provision, too, may suggest that PASPA can be reasonably read as prohibiting active state involvement in sports gambling as opposed to repeals of state law prohibitions, in whole or in part. See Pet. App. 32a (Fuentes, J., dissenting) (finding no violation of PASPA because there is no "sports wagering *pursuant to state law* when there is effectively no law in place as to several locations, no scheme created, and no state involvement").

Unlike the construction by the en banc majority, this constitutional avoidance construction of PASPA does not produce the en banc majority's bizarre result – irreconcilable with any coherent public purpose – that allowing *more* sports betting can move a State *closer* to compliance with PASPA. Instead, PASPA may be construed to mean that a State has the autonomy to repeal as much *or as little* of its state law sports gambling prohibitions as it chooses. And unlike the construction by the en banc majority, this construction is at least rooted in a principle: "[t]he right to do that which is not prohibited derives not from the authority of the state but from the inherent rights of the people." Pet. App. 159a.

Finally, nothing in the text of PASPA or its legislative history suggests that Congress "in fact faced, and intended to bring into issue," *Bass*, 404 U.S. at 349, whether the National Government has the power to command a State to keep in place *any* part of a state law prohibition that the State wishes to repeal. Certainly, there is no indication that when enacting PASPA, Congress contemplated the possibility that a

State, in the exercise of its sovereign legislative functions, might do what New Jersey has done: repeal its laws against sports gambling in certain locations and strip "all state agencies with jurisdiction over state casinos and racetracks" of "any sports betting oversight."[25] Pet. App. 33a (Fuentes, J., dissenting).

Congress did not contemplate – and therefore did not directly consider – whether it had the constitutional authority to stop a State from simply repealing some of its state law prohibitions against sports gambling. This Court could insist that Congress speak with utter clarity – far more clarity than can be found in PASPA – if it meant to assert such an unprecedented power and effect such a radical shift in federal-state relations.

Under this construction, because PASPA does not prohibit New Jersey's repeal of sports gambling prohibitions at three categories of venues: Atlantic City casinos, current racetracks (such as Monmouth Park) and former racetrack racecourses, there is no need to decide the constitutional question.

* * *

[25] As set forth earlier (at 9), Monmouth Park, through the NJTHA, is the founding member of a private regulatory body called TISWA, which is designed to provide integrity and protect the public with respect to sports betting. J.A. 226 ¶7; J.A. 148-152.

Either PASPA allows States to repeal their sports betting prohibitions in whole or in part, or it is unconstitutional. Either way, New Jersey's 2014 Repealer is valid.

CONCLUSION

The judgment of the court of appeals should be reversed, with instructions to vacate the injunction and dismiss the complaint.

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No. 16-477

In The Supreme Court of the United States

NEW JERSEY THOROUGHBRED HORSEMEN'S ASSOCIATION, INC.,

Petitioner,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, NATIONAL BASKETBALL ASSOCIATION, NATIONAL FOOTBALL LEAGUE, NATIONAL HOCKEY LEAGUE, OFFICE OF THE COMMISSIONER OF BASEBALL, doing business as MAJOR LEAGUE BASEBALL,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

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PRELIMINARY STATEMENT

In our opening brief we wrote that the 2014 Repealer was valid for "two alternative" reasons. NJTHA Br. 14. As a result of what Respondents and the United States have written in their briefs, the 2014 Repealer is valid for a third reason.

First, the NJTHA, State Petitioners, and many *amici*[1] contend that PASPA's most natural meaning is that it commands the States to prohibit sports wagering. Respondents and the United States do not dispute that if PASPA is interpreted this way, it is unconstitutional.

Second, the NJTHA contends that PASPA is susceptible of a construction that permits the Court to avoid deciding the constitutional question presented. Under this avoidance construction, adopted by Judges Fuentes and Restrepo, PASPA does not prohibit the States from repealing state laws against sports wagering, and New Jersey's 2014 Repealer does not violate PASPA because it is a valid partial repeal.

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[1] The briefs filed by the following *amici* have endorsed this interpretation of PASPA: (a) States of West Virginia, 17 other States, and the Governors of Kentucky, Maryland, and North Dakota; (b) National Governors Association, National Conference of State Legislatures, Council of State Governments, National League of Cities, and International Municipal Lawyers Association; (c) Pacific Legal Foundation, Competitive Enterprise Institute, Cato Institute, and Wisconsin Institute for Law and Liberty; (d) American Gaming Association; (e) Constitutional Law Scholars; (f) Congressman Frank J. Pallone, Jr., and (g) John T. Holden.

Third, Respondents proffer what they contend is a savings interpretation of PASPA that "does not require states to maintain or enforce anything." Resp. Br. 36. On this view, PASPA provides the States with many sports-betting choices, such as a full repeal of sports-betting prohibitions and some partial repeals of sports-betting prohibitions. *Id.* at 36-41.

Respondents' construction of PASPA is not only flawed as a matter of statutory interpretation, but fails to save PASPA's constitutionality. NJTHA Br. 42-49. Yet even under Respondents' construction, New Jersey's 2014 Repealer does not violate PASPA. Respondents contend that PASPA prohibits the 2014 Repealer because that law "ensured that sports-gambling schemes would be operated *only* by state-licensed gambling venues." Resp. Br. 13 (emphasis added). But Respondents' description of the 2014 Repealer is wrong.

The 2014 Repealer does not apply "only" to "state-licensed gambling venues." It also applies to venues that are not state-licensed gambling venues, such as former racetrack racecourses. Thus, even under Respondents' reading of PASPA, the 2014 Repealer does not violate PASPA because it is a valid, partial repeal of sports-betting prohibitions.

ARGUMENT

I

The Construction Of PASPA Proposed By Respondents And The United States Is Unreasonable And Fails To Save PASPA's Constitutionality.

Petitioner NJTHA, State Petitioners, and several *amici* contend that the most natural meaning of PASPA is that it commands the States to maintain state law prohibitions against sports wagering and, therefore, PASPA violates the anti-commandeering doctrine. The United States agrees that "[i]f Section 3702(1) compelled States to * * * maintain prohibitions on sports gambling, it would violate the Tenth Amendment." U.S. Br. 19; see also *id.* at 8 ("Section 3702 would violate the Tenth Amendment if it commanded the States to * * * maintain prohibitions on sports gambling."); *id.* at 12 ("And because Congress cannot force States to *enact* specific regulations, it also cannot compel them to *maintain* specific regulations that they happen to have enacted already.").

Respondents are not quite as forthright as the United States, but their repeated insistence that "PASPA does not require states to maintain existing prohibitions against sports gambling," effectively provides the same answer. Resp. Br. 19-20; see also *id.* at 36 ("PASPA does not require states to maintain or enforce anything."); *id.* at 45 ("PASPA does not prohibit states from repealing their sports-gambling prohibitions.").

If the Court adopts the natural meaning of PASPA and concludes that Senator Bradley was correct that it "prohibited" States "from allowing sports betting," 138 Cong. Rec. S17434-01, at S17435, 1992 WL 275344 (daily ed. Oct. 7, 1992) (statement of Sen. Bradley), there is no question that it is unconstitutional. To avoid this inevitable conclusion, Respondents and the United States must construe PASPA to allow States a choice to lift their prohibitions on sports gambling. But to avoid the otherwise inevitable conclusion that the 2014 Repealer is valid, they must simultaneously construe PASPA to prevent States from lifting the prohibition for too *few* people or at too *few* locations. Resp. Br. 42-46; U.S. Br. 20-24.

This construction provides no criteria to determine how few is too few. It is, therefore, a wholly indeterminate standard. For example, if a State were to lift the prohibition on sports gambling, but only as applied to sports gambling conducted by churches and other charitable organizations, would that repeal cover enough people and enough locations to comply with this interpretation of PASPA? Or would the answer vary from State to State depending on how many churches were located in a particular State? Further, this construction is an unnatural one because it imputes to Congress a preference for legal sports betting by *more* people in *more* places rather than *fewer* people in *fewer* places. See NJTHA Br. 42-47.

In any event, this construction fails to save PASPA. That's because Respondents and the United States are fundamentally wrong about the distinction

between constitutionally-permissible preemption and constitutionally-impermissible commandeering.

They contend that the distinction is between affirmative commands to act and negative prohibitions from acting; that is, between "*thou shalt*" and "*thou shalt not*." Resp. Br. 19. But that can't be the proper distinction, for most any affirmative command can be rephrased as a negative prohibition from acting – and vice versa.[2] Indeed, if that were the distinction, anti-commandeering doctrine critics would be correct that it is unprincipled and manipulable.[3]

And their proposed distinction makes hash of this Court's reliance on *Coyle* v. *Smith*, 221 U.S. 559 (1911), as the precedential foundation of its modern anti-commandeering doctrine. *New York* v. *United States*, 505 U.S. 144, 162 (1992) (citing *Coyle* for the proposition

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[2] Respondents' allusion to the Ten Commandments illustrates the point. The negative command, "Thou shalt not covet thy neighbour's house, thou shalt not covet thy neighbour's wife, nor his manservant, nor his maidservant, nor his ox, nor his ass, nor any thing that is thy neighbour's," *Exodus* 20:17 (King James), is rephrased in the Bible itself as a positive command, "Let your conversation be without covetousness; and be content with such things as ye have," *Hebrews* 13:5 (King James).

[3] See, *e.g.*, Evan H. Caminker, *State Sovereignty and Subordinacy: May Congress Commandeer State Officers to Implement Federal Law?*, 95 Colum. L. Rev. 1001, 1054-55 (1995) ("Although one can use verbal wordplay to make it sound as though commandeering and preemption frustrate accountability in different ways, this is merely definitional manipulation without substance. Prohibiting commandeering but not preemption in the name of securing the accountability of state government is simply arbitrary.").

that the recent statements "were not innovations," because while "Congress has substantial powers to govern the Nation directly, including in areas of intimate concern to the States, the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions"). In *Coyle*, the unconstitutional act of Congress required no affirmative action by the State of Oklahoma; it merely prohibited the State from moving its capital.

Respondents may think that *Coyle* speaks only to the Equal Footing Doctrine and has nothing to do with the anti-commandeering doctrine. See Resp. Br. 27 n.4. This Court in *New York* said otherwise. See also *Coyle*, 221 U.S. at 565 ("That one of the original thirteen states could now be shorn of such powers by an act of Congress would not be for a moment entertained.").

The anti-commandeering doctrine is rooted in the fundamental decision made at the constitutional convention to opt for a national government that acts directly on the people rather than one that acts through the States on the people. If the national government attempts to require a State to govern according to Congress' instructions by using a State against its will to regulate its people, that is impermissible commandeering. If the national government directly regulates the people, and requires a State to stand aside, that is permissible preemption.[4]

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[4] A police officer commandeers a car whether he gets in the passenger seat and orders the driver to "follow that car!" or pulls

Preemption involves Congress telling the people what they must do, what they may do, or what they can't do. The federal law can prohibit an activity, see, *e.g.*, *Gonzales* v. *Raich*, 545 U.S. 1 (2005) (upholding federal prohibition of marijuana); tightly regulate an activity, see, *e.g.*, *Riegel* v. *Medtronic, Inc.*, 552 U.S. 312 (2008) (describing the Medical Device Amendments of 1976 as "impos[ing] a regime of detailed federal oversight"); or provide that people have a federal right to freely engage in that activity, see, *e.g.*, *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 378 (1992) (describing federal deregulation as "ensur[ing] that the States would not undo federal deregulation with regulation of their own"). The people must obey that federal law. And the courts, both state and federal, must decide cases in accordance with that federal law, "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. Art. VI, Cl. 2.

The federal law stands on its own bottom, can be enforced without regard to state law, and requires nothing of state law or state action other than to give way to superior federal law. See Caleb Nelson, *Preemption*, 86 Va. L. Rev. 225, 252 (2000) (noting that "the Supremacy Clause says that courts must apply all valid rules of federal law. To the extent that applying state law would keep them from doing so, the

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the driver out of the car and drives it himself – with or without issuing an affirmative command, the officer is using the car for his own ends, not the driver's. By contrast, a police officer does not commandeer anything if he stays in his own patrol car, turns on the siren, and affirmatively commands drivers blocking his way to move to the side.

Supremacy Clause requires courts to disregard the state rule and follow the federal one."); Allison H. Eid, *Preemption and the Federalism Five*, 37 Rutgers L.J. 1, 38 (2005) (noting that preemption is the "doctrinal descendant of the Supremacy Clause," which "acts as a conflict-of-laws principle that instructs courts to apply federal law in the event of a conflict with state law").

There is no federal anti-sports-betting regulatory scheme that directly governs the people's conduct and displaces state law. As Judge Vanaskie stated: "Unlike in *Morales* and other preemption cases in which federal legislation limits the actions of state governments, in this case, there is no federal scheme regulating or deregulating sports gambling by which to preempt state regulation. PASPA provides no federal regulatory standards or requirements of its own." Pet. App. 190a.

Respondents point to a number of federal statutes in a futile attempt to cobble together a federal regulatory or deregulatory sports-gambling scheme. Resp. Br. 49-50. But none of these statutes create a federal scheme prohibiting sports betting in a state where sports betting is not already prohibited by state law.[5]

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[5] Respondents cite to five statutes. Resp. Br. 49. Almost all of them specifically exclude a situation where the underlying conduct is legal by state law (18 U.S.C. 1955; 18 U.S.C. 1301; 31 U.S.C. 5362(10)). One of them is limited to bribery in sporting contests (18 U.S.C. 224(a)) and specifically states that it is not intended "to occupy the field in which this section operates to the exclusion of a law on any State * * * and no law of any State * * * which would be valid in the absence of the section shall be declared invalid" (*id.*

As Judge Vanaskie pointed out, PASPA is the only statute that tries to regulate the States under the Commerce Clause even though there is no federal regulatory or deregulatory scheme. Pet. App. 190a n.4.

Unless there is a federal rule displacing state law that directly governs the people's conduct – whether constraining that conduct or providing a right to engage in that conduct (or some combination of the two) – there is no predicate for preemption. Contrary to the suggestion of Respondents and the United States, there is no federal power to simply dictate a "federal policy" regarding the content of state law.

As Judge Niemeyer has explained:

> Congress may govern directly the *people* * * * [b]ut it may not govern the *states* for the purpose of indirectly exacting its will on the people. Preemption involves the *direct* federal governance of the people in a way that supersedes concurrent state governance of the same people, not a federal usurpation of state government * * * for federal ends.

Petersburg Cellular Partnership v. *Nottoway County*, 205 F.3d 688, 703 (4th Cir. 2000).

This core constitutional principle remains true whenever a state legislature removes a state law prohibition on private conduct. If state officials are compelled by federal law to treat that state law prohibition

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at 224(b)). The final one (18 U.S.C. 1084) is limited to a situation where an interstate wire is used.

on private conduct as still valid and binding law – even as to only one location or one narrow circumstance – there is still federal usurpation of state government for federal ends, not direct federal governance of the people that supersedes concurrent state governance of the same people.

In their effort to treat PASPA as a routine example of preemption, Respondents conflate two very different aspects of national power. The first involves the national power to regulate the people directly (and thereby displace contrary state law). The second involves directly regulating the States as market participants, such as by requiring the States to comply with minimum wage and maximum hours laws, *Garcia* v. *San Antonio Metro. Transit Author.*, 469 U.S. 528 (1985), with laws prohibiting age and disability discrimination in employment, *Kimel* v. *Fla. Bd. of Regents*, 528 U.S. 62 (2000); *Univ. of Ala.* v. *Garrett*, 531 U.S. 356 (2001); with laws governing the issuance of bonds, *South Carolina* v. *Baker*, 485 U.S. 505 (1988); and with laws governing the sale of data. *Reno* v. *Condon*, 528 U.S. 141 (2000). But it is a dangerous sleight of hand to suggest, as Respondents do, that by exercising the power to directly regulate States as market participants, the national government can bootstrap itself into some additional power to dictate the extent to which a State may allow its people to engage in private activity.

PASPA makes it unlawful for a governmental entity to "sponsor, operate, advertise, [or] promote" sports gambling. Those prohibitions are directed to a State in

its role as market participant, not as a sovereign regulator. But PASPA also makes it unlawful for a governmental entity to "authorize by law or compact" sports gambling. This prohibition is not directed to a State in its role as a market participant. Instead, this prohibition is directed to a State in its role as the sovereign regulator of its own people.[6]

Respondents repeatedly emphasize PASPA's prohibitions on a State's commercial activity as a market participant. They try to elide the distinction between a State's own commercial activity and the activity of private parties subject to a State's sovereign regulatory control. They describe PASPA as prohibiting States from operating sports-gambling schemes themselves, and repeatedly characterize PASPA's prohibition on state authorization by law of sports gambling as prohibiting private parties from conducting such schemes "in the states' stead," or as if private parties are the State's "agent." Resp. Br. i; see also *id.* at 1, 2, 8, 29, 40. But none of these terms appear anywhere in the text of PASPA.

A private party does not conduct business "in the states' stead," or as the State's "agent," simply because

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[6] PASPA also has an intermediate prohibition that makes it unlawful for a governmental entity to "license" sports gambling. This can be read as directed to a State in its role as a market participant (as the owner of any intellectual property can license others to use that property) or as directed to a State in its role as a sovereign regulator of its own people (as only a sovereign can issue, *e.g.*, drivers licenses). If read as the former, it has no application in this case; if read as the latter, it has the same constitutional infirmities as "authorize by law."

there are a limited number of locations where its business is permitted. An extreme case demonstrates the point: If a State were to repeal its prohibitions against prostitution, but only in areas that had already become red light districts, would that make prostitutes state agents? Even a highly-regulated private business with monopoly power does not operate "in the states' stead." See *Nat'l Collegiate Athletic Ass'n* v. *Tarkanian*, 488 U.S. 179, 198-99 (1988); *Jackson* v. *Metro. Edison Co.*, 419 U.S. 345, 351-52 (1974).

Under Respondents' approach, so long as Congress required the States as employers to provide a $15 per hour minimum wage, it could also prohibit States as sovereigns from authorizing businesses in the State to pay less than $15 per hour. Similarly, so long as Congress required the States as borrowers to meet certain standards when issuing bonds, it could also prohibit States as sovereigns from authorizing businesses in the State to issue bonds that fail to meet those standards. That is an invitation to Congress to evade responsibility for restrictions on private conduct.

Respondents and the United States wish they could rewrite PASPA so that it worked like an ordinary federal statute with preemptive effect, and said something like, "Any provision in state law to the contrary notwithstanding, it shall be unlawful for any person to operate a sports-gambling scheme." That wished-for statute is not what Congress enacted in PASPA. Even now, after five years of litigation up and down the

federal judiciary, no one has identified a single other statute that works the peculiar way PASPA does.[7]

PASPA's impact on the NJTHA demonstrates that PASPA is an unconstitutional federal statutory outlier. The NJTHA is not being subjected to direct federal governance of its activity, with the state officials being compelled to stand aside. Instead, the NJTHA is being subjected to the federal government's usurpation of state government for federal ends.

Faced with the NJTHA's argument that Respondents lacked the clean hands necessary to obtain equitable relief, the district court declined to enjoin the NJTHA. Respondents did not cross-appeal from that decision. The injunction runs only against state officials. It forbids state officials from giving effect to the state legislature's decision to lift prior state law prohibitions on the NJTHA's conduct. Because of the injunction against the state officials, the NJTHA faces the prospect of a state court prosecution for violating a state law that the state legislature has repealed.

In an effort to escape the plain commandeering the injunction displays, Respondents contend that "the injunction does not require New Jersey to *enforce* its state-law prohibitions." Resp. Br. 44 n.11. This is a

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[7] The breadth of the search underscores the failure: PASPA is not an anti-discrimination statute, does not enforce the Reconstruction Amendments, and does not impose economic sanctions on a foreign nation. Cf. U.S. Br. 24-25 & n.7. Nor does PASPA govern foreign affairs, require state adjudicators to apply federal law, or hortatorily call on state administrative agencies to "consider" federal suggestions. Cf. Resp. Br. 50-51.

remarkable assertion. If true, what *would* the injunction require?

The United States makes a similar argument that the "injunction does not compel the officials to take specific acts or to bring particular enforcement actions," but "merely requires [state officials] to respect the court's determination that the 2014 Act is preempted." U.S. Br. 27. But how do state officials show "respect" for the determination that a repealed law is still valid other than by enforcing that law? Cf. *First Nat. Bank in St. Louis v. State of Missouri*, 263 U.S. 640, 660 (1924) ("To demonstrate the binding quality of a statute, but deny the power of enforcement involves a fallacy made apparent by the mere statement of the proposition, for such power is essentially inherent in the very conception of law.").

Perhaps the United States means that while state officials are not compelled to bring "particular enforcement actions," they must bring *some* enforcement actions in accordance with their ordinary exercise of enforcement discretion. If so, due to the injunction, the NJTHA still faces the risk of prosecution by state officials for violating a state law that the state legislature has repealed.

The United States suggests that "if the injunction raised concerns, the solution would be to limit respondents to declaratory relief." U.S. Br. 28 n.9. This "solution" jumps from the anti-commandeering frying pan into the advisory opinion fire. What saves a declaratory judgment sought by a party with a coercive claim is

precisely that it can, if necessary, be relied upon for coercive relief like an injunction, as 28 U.S.C. 2202 contemplates. Compare *Aetna Life Ins. Co.* v. *Haworth*, 300 U.S. 227 (1937), with *Muskrat* v. *United States*, 219 U.S. 346 (1911); see also Richard H. Fallon, Jr. *et al.*, Hart and Wechsler's The Federal Courts and The Federal System at 1155-1156 (7th ed. 2015) ("Indeed, if a federal declaratory judgment lacked any significant preclusive effect, mightn't it constitute a constitutionally forbidden advisory opinion?").

If the injunction means anything, it means that the NJTHA faces the prospect of a state court prosecution for violation of a state law that the state legislature has repealed.[8] That's commandeering.

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[8] Respondents complain that the 2014 Repealer "does not repeal *any* of New Jersey's myriad prohibitions on sports gambling; indeed, it did not eliminate a single word from those laws." Resp. Br. 42. But as the United States has correctly argued in a different case pending this term, it makes no difference whether a legislature acts by changing the text of a preexisting law or by enacting an entirely new statute; in either case, "courts must give effect to either type of enactment as a duly-enacted law." Brief for the Federal Respondents at 36, *Patchak* v. *Zinke*, No. 16-498 (Sept. 11, 2017).

II

The Prohibition Of Private Sports Gambling "Pursuant To The Law Or Compact Of A Governmental Entity" Is Not Independent Of The Prohibition Of A "Governmental Entity" Authorizing Sports Gambling "By Law Or Compact."

PASPA makes it unlawful for "(1) a governmental entity to * * * authorize by law or compact, or (2) a person to sponsor, operate, advertise, or promote, pursuant to the law or compact of a governmental entity," sports gambling. The secondary prohibition against "a person" is not an independent prohibition on private conduct. It is, instead, both textually and functionally dependent on the primary prohibition on the conduct of a "governmental entity."

Textually, the secondary prohibition on a "person" engaging in sports gambling "pursuant to the law or compact of a governmental entity" is plainly a reference to the "authoriz[ation] by law or compact" that the primary prohibition in that same sentence tells a "governmental entity" not to provide. The United States ignores this obvious textual point in suggesting that, if the "authorize by law" provision in §3702(1) is unconstitutional, the "pursuant to law" provision in §3702(2) nonetheless remains in effect. It proposes treating PASPA as if the words "law or" were deleted from §3702(1), but not from §3702(2). U.S. Br. 32. But if PASPA is treated as if the words "law or" were deleted from §3702(1), it must be treated as if those words were also deleted from the interdependent §3702(2), making it unlawful for

> (1) a governmental entity to sponsor, operate, advertise, promote, license, or authorize by ~~law or~~ compact, or
>
> (2) a person to sponsor, operate, advertise, or promote, pursuant to the ~~law or~~ compact of a governmental entity,
>
> a [sports-gambling scheme].[9]

The resulting §3702(2) would obviously have no application in this case.

Functionally, if there is no primary violation by a "governmental entity," there is no predicate for a secondary violation by a private person acting "pursuant to" the forbidden "law or compact of a governmental entity." If New Jersey's 2014 repeal of its prohibition on sports betting at particular locations is valid, then the legal status under New Jersey law of betting on sports at Monmouth Park is the same as the legal status under New Jersey law of wearing a hat, singing a song, writing a poem, or hugging one's child – and only in a totalitarian state would it be said that these activities are done "pursuant to the law * * * of a governmental entity."

Yet even if the prohibition against a "person" "pursuant to the law or compact of a governmental entity"

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[9] This assumes, along with the United States, that the "by compact" provision survives. That provision is not at issue in this case, and might survive either as an aspect of Congressional power over Indian tribes, see, *e.g.*, *United States* v. *Lara*, 541 U.S. 193, 200 (2004), or as an aspect of Congressional power to withhold consent to interstate compacts. U.S. Const. Art. I, § 10.

were treated as independent of the prohibition of a "governmental entity" authorizing sports gambling "by law or compact," that would not aid Respondents in this case. The district court declined to grant any relief against the NJTHA. Respondents did not cross-appeal from that determination. In the absence of a cross-appeal, they cannot gain greater rights than they obtained from the district court judgment. *Jennings* v. *Stephens*, 135 S. Ct. 793, 798 (2015).

III

New Jersey's 2014 Repealer, Correctly Described, Does Not Violate PASPA Even Under The Interpretation Of PASPA Suggested By Respondents And The United States.

The NJTHA submits that PASPA is susceptible of a construction that avoids the constitutional question: PASPA can be construed to allow States to repeal state law prohibitions to whatever extent the State chooses, either in whole or in part. This construction, unlike the construction offered by Respondents and the United States, avoids the perverse result that the *more* sports betting a State allows, the *closer* it comes to compliance with PASPA. See *supra* at 4; NJTHA Br. 42-57. The NJTHA's avoidance construction actually avoids the constitutional question, while the construction offered by Respondents and the United States not only fails to avoid the need to decide the constitutional question, but also fails to save PASPA's constitutionality. See *supra* at 4-15.

There is yet another way the Court can avoid the need to decide the constitutional question.[10] New Jersey's 2014 Repealer, when correctly described, does not violate PASPA even under the interpretation of PASPA suggested by Respondents and the United States.

Respondents provide a litany of choices that they say their reading of PASPA gives to the States:

(1) States can fully repeal all state law prohibitions against sports gambling (Resp. Br. 37);

(2) States can alter state law sports-betting penalties (*ibid.*);

(3) States can create exemptions from sports-betting prohibitions to allow for *de minimis* friendly sports wagers (*ibid.*);

(4) States can control the extent to which they choose to enforce sports-gambling prohibitions (*ibid.*);

(5) States can change sports-betting laws (*id.* at 40);

(6) States can decriminalize sports wagers between social acquaintances (*ibid.*); and

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[10] The NJTHA has never abandoned its argument that the 2014 Repealer is consistent with PASPA, but even if it had, the possibility of a statutory interpretation that avoids a constitutional question would still be properly before the Court. *Matal* v. *Tam*, 137 S. Ct. 1744, 1755 (2017).

(7) States can decide to take a hands-off approach to sports betting by choosing to stand "on the sidelines" (*id.* at 39).

Even though Respondents say PASPA leaves at least these seven broad choices to the States, they say the 2014 Repealer is not permissible because it ensures "that sports-gambling schemes would be operated *only* by state-licensed gambling venues." Respondents' Br. 13 (emphasis added). This argument suffers from a fundamental factual flaw in its premise – the text of the 2014 Repealer is not limited "only" to "state-licensed gambling venues."[11]

The 2014 Repealer repeals all laws, rules, and regulations that prohibit sports betting at Atlantic City casinos and at any "running or harness horse racetrack" in New Jersey. Pet. App. 219a. Section 1 of the Repealer defines "running or harness horse racetrack" to include "*any former racetrack where such a meeting was conducted within 15 years prior to the effective date of this act, excluding premises other than those where the racecourse itself was located.*" Pet. App. 220a (emphasis added). The United States incorrectly analogizes the 2014 Repealer to a state law that repealed a

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[11] The United States, in its amicus brief, is internally inconsistent as to the venues within the scope of the 2014 Repealer. On the one hand, the United States incorrectly writes that "New Jersey wishes * * * to authorize sports gambling at its licensed casinos and racetracks, but nowhere else." U.S. Br. 20. It isn't until the penultimate sentence of its brief (p.35) that the United States corrects itself and reluctantly acknowledges that the 2014 Repealer "*almost* exclusively" applies to "entities that hold state licenses to conduct other gambling" (emphasis added).

prohibition on teeth-whitening to the extent that it applies to licensed dentists who provide such services to adults. U.S. Br. 22. But the correct analogy would be to a state law that repealed a prohibition on teeth-whitening to the extent that it applies to adult customers at a current dentist office or *any other office that has been used as a dentist office at any time during the past 15 years*.

As noted in our opening brief (p.12 n.6), it is undisputed that there are two "former" racetracks in New Jersey – Garden State Park ("GSP") and Atlantic City Racecourse. Both of these "former" racetracks are venues within the scope of the 2014 Repealer's repeal of sports-betting prohibitions.

Neither of these "former" racetracks holds a gambling license or, for that matter, any kind of license. For example, the site of the former GSP "racecourse" has for many years been the site of a private shopping mall where businesses such as Home Depot, Bed Bath & Beyond, Best Buy, and Barnes & Noble are located. See http://marketplaceatgardenstatepark.com/. The stores in the mall are not "state-authorized" or "state-licensed" gambling venues. Respondents' premise, therefore, that the 2014 Repealer applies "only" to "state-licensed gambling venues" is factually wrong.

There are two other errors in Respondents' description of the text of the 2014 Repealer. First, under the Repealer, even as to "state-licensed" casinos and current racetracks, the repeal of sports-betting prohibitions is not limited to the licensed operator of a

casino or racetrack. Rather, under section 1 of the 2014 Repealer, sports betting can be conducted by "any person" who has the consent of the "operator" of the casino or racetrack, whether "any person" holds a gambling license or not.[12] Pet. App. 219a. Second, even if a licensed operator of a casino or racetrack conducted sports wagering at their venue, the State's gaming and horse racing regulatory agencies – the Division of Gaming Enforcement, the Casino Control Commission, and the New Jersey Racing Commission – have no authority under the 2014 Repealer to license or otherwise regulate their sports-betting activity. J.A. 263-282.

If the Court accepts Respondents' interpretation of PASPA and applies it to an accurate description of the plain text of the 2014 Repealer, then PASPA does not prohibit the 2014 Repealer. The 2014 Repealer fits squarely within the scope of at least two of the seven choices that Respondents have identified as permitted by PASPA.

1. If PASPA is construed, as Respondents and the United States argue, to permit full repeals by States of sports-betting prohibitions, it cannot logically

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[12] This provision simply recognizes the property rights of the operator lest anyone read the 2014 Repealer to allow anyone and everyone to engage in sports gambling at casinos, racetracks, and former racetracks despite the objections of the operator. The United States expresses confusion about identifying the operator of a former racetrack, U.S. Br. 35, but since former racetracks are included in the statutory definition of "racetrack," the operator is simply whoever has the appropriate property rights for that location.

prohibit partial repeals such as the 2014 Repealer. Judge Fuentes' reasoning on this point is unassailable:

> A repeal is defined as an "abrogation of an existing law by legislative act." When a statute is repealed, "the repealed statute, in regard to its operative effect, is considered as if it had never existed." If a repealed statute is treated as if it never existed, a partially repealed statute is treated as if the repealed sections never existed. The 2014 Repeal, then, simply returns New Jersey to the state it was in before it first enacted those prohibitions on sports gambling. In other words, after the repeal, it is as if New Jersey *never* prohibited sports wagering at casinos, gambling houses and horse racetracks. Therefore, with respect to those locations, there are no laws governing sports wagering. * * * [T]he permission to engage in such an activity is not affirmatively granted *by virtue of* it being prohibited elsewhere.

Pet. App. 30a-31a (footnotes omitted); see also Erwin Chemerinsky *et al.*, *Cooperative Federalism and Marijuana Regulation*, 62 UCLA L. Rev. 74, 103 (2015); NJTHA Br. 26-30.

2. If PASPA allows States to stand "on the sidelines," then it does not prohibit the 2014 Repealer. That's because the 2014 Repealer requires New Jersey to remain "on the sidelines" with respect to sports

betting at selected venues, only some of which are state-licensed for other gambling activity.[13]

As explained by David L. Rebuck, the Director of New Jersey's Division of Gaming Enforcement ("DGE"), the 2012 Law "would have created a detailed regulatory regime for sports wagering" with "specific provisions governing the actual operation of sports pools." J.A. 265-266 ¶¶4-5. Under the 2014 Repealer, however, any sports wagering offered by casinos and racetracks will be "without state regulation by DGE." J.A. 268 ¶6. "DGE will have no role or say in any decision by a casino or racetrack to either internally operate a sports pool or hire a private company like William Hill to operate the casino's or racetrack's sports pool." J.A. 268-269 ¶7.

Similarly, the New Jersey Racing Commission, which "administers and enforces" "statutory provisions and regulations through investigations, penalties, fines, exclusions, and revocation of licenses" with respect to horse racing in New Jersey, will have "no role at all in sports wagering" under the 2014 Repealer and will have "no involvement at all in any of the sports wagering operations" at New Jersey racetracks. J.A. 275-276 ¶¶6, 8.

New Jersey's Casino Control Commission, which licenses New Jersey casinos as well as casino key employees, "will not be involved in any review or licensing

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[13] Gambling licenses issued by New Jersey to casinos and racetracks are not licenses to conduct sports betting. There is no such thing as a sports betting license issued by New Jersey.

of sports pool wagering employees" under the 2014 Repealer because under the Repealer "no statutory or regulatory provision requires licensure or oversight by the Commission of operators or employees of sports pools." J.A. 281 ¶¶7-8.

The fact that New Jersey as a matter of policy has decided to remain "on the sidelines" by repealing state laws prohibiting sports betting at a few locations does not mean there is no supervision over sports-betting activity. The NJTHA is the founding member of a private regulatory body called The Independent Sports Wagering Association ("TISWA"). J.A. 226 ¶7; J.A. 148-152. TISWA is designed to provide integrity and protect the public with respect to sports-betting activity. J.A. 226 ¶7. Successful private monitoring of sports betting already exists at venues where sports betting is legal. See generally Amicus Brief of American Gaming Association 18-20.

CONCLUSION

The judgment of the court of appeals should be reversed, with instructions to vacate the injunction and dismiss the complaint.

Respectfully submitted,

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RECORD AND BRIEFS

In The
Supreme Court of the United States

NEW JERSEY THOROUGHBRED HORSEMEN'S ASSOCIATION, INC.,

Petitioner,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, NATIONAL BASKETBALL ASSOCIATION, NATIONAL FOOTBALL LEAGUE, NATIONAL HOCKEY LEAGUE, OFFICE OF THE COMMISSIONER OF BASEBALL, doing business as MAJOR LEAGUE BASEBALL,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

SUPPLEMENTAL BRIEF SUBMITTED BY NEW JERSEY THOROUGHBRED HORSEMEN'S ASSOCIATION, INC. IN RESPONSE TO BRIEF OF THE UNITED STATES

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1. THIS CASE IS NOT A RE-RUN OF *CHRISTIE I*.

1. The United States has joined the court of appeals in abandoning the saving construction given PASPA in *Christie I*. Absent this Court's intervention, the result will be the whipsawing of New Jersey and the evisceration of the anti-commandeering doctrine.

In the first round of litigation, petitioners argued that "to the extent a state may choose to repeal an affirmative prohibition of sports gambling, that is the same as 'authorizing' that activity, and therefore PASPA precludes repealing prohibitions on gambling just as it bars affirmatively licensing it." *Nat'l Collegiate Athletic Ass'n* v. *Governor of New Jersey*, 730 F.3d 208, 232 (3d Cir. 2013). Writing for the court of appeals, Judge Fuentes rejected this argument, reasoning that the "attempt to read into PASPA a requirement that the states must affirmatively keep a ban on sports gambling in their books rests on a false equivalence between repeal and authorization." *Id.* at 233. He explained that repeal and authorization are different because the "right to do that which is not prohibited derives not from the authority of the state but from the inherent rights of the people." *Id.* at 232. The distinction between repeal and authorization was explicitly designed to save PASPA's constitutionality. *Id.* at 233.

When petitioners sought certiorari, the United States embraced this saving construction:

> * * * PASPA does not obligate States to enact any law or to implement or administer

> any federal regulatory requirement. Indeed, PASPA does not require States to do anything. * * * PASPA does not even obligate New Jersey to leave in place the state-law prohibitions against sports gambling that it had chosen to adopt prior to PASPA's enactment. To the contrary, New Jersey is free to repeal those prohibitions in whole or in part.

U.S. Brief in Opposition, *Christie I*, at 11.

This time round, with Judge Fuentes dissenting, the court of appeals chose instead "to excise that discussion from our prior opinion as unnecessary dicta," Pet. Appx. A at 23a, a determination akin to excising Chief Justice Roberts' distinction between a tax and a command as dicta. *See Nat'l Fed'n of Indep. Bus.* v. *Sebelius*, 132 S. Ct. 2566, 2601 (2012).

The United States similarly attempts to excise its prior statements to this Court, claiming that it didn't mean to distinguish between a repeal and an authorization, U.S. Brief at 15, and insisting that a partial repeal "is equivalent to" an authorization. *Id.* at 17. That is precisely the "equivalence" that was deemed "false" when urged by the petitioners in round one. Indeed, the United States contends that "virtually any other license or authorization could likewise be reframed as a partial repeal conditioned on the satisfaction of specified requirements." U.S. Brief at 17. Under that approach, any repeal of a prohibition could likewise be reframed as a license or authorization of the conduct no longer prohibited. As a result, if the court of appeals

and the United States are correct, the national government has enormous power to prevent States from lifting State law prohibitions on private conduct, thereby requiring States to prohibit conduct that the State has chosen not to prohibit.

The United States continues to concede that New Jersey could "repeal its prohibition on sports gambling altogether." U.S. Brief at 15. But having abandoned the distinction between authorization and repeal – and the underlying jurisprudential premise that the right to do that which is not prohibited derives not from the authority of the state but from the inherent rights of the people – it fails to offer a limiting principle on the national government's power to block States from removing state law prohibitions.

Could the national government bar New Jersey from lifting state law prohibitions on sports gambling in only two of its twenty-one counties, leaving the state law prohibition in place in the rest? Could it bar New Jersey from lifting state law prohibitions on sports gambling by competent adults, leaving in place state law prohibitions on sports gambling by children and the incompetent?

Could the national government bar States from rescinding state minimum wage laws in economically distressed localities? Could it bar States from amending state firearm laws to permit more people to carry concealed weapons?

The best that the United States can do is to echo the Leagues in proposing a limiting principle: "common sense." U.S. Brief at 15. But if common sense were a sufficiently sturdy tool with which to constrain the power of the national government, there would be no need for the various doctrines of federalism developed by this Court over the centuries. *Cf. Sebelius*, 132 S. Ct. at 2648 (joint opinion of Scalia, Kennedy, Thomas, and Alito, JJ.) (rejecting an argument of the United States because "were it to be a premise for the exercise of national power, it would have no principled limits.").

"If the federal government could make it illegal under federal law to remove a state-law penalty, it could then accomplish exactly what the commandeering doctrine prohibits: The federal government could force the state to criminalize behavior it has chosen to make legal." *Conant* v. *Walters*, 309 F.3d 629, 646 (9th Cir. 2002) (Kozinski, J., concurring). As the United States previously recognized in urging this Court to deny review in *Christie I*, this is true whether the State chooses to remove a state law penalty "in whole or in part." The repudiation of this principle by the United States underscores the need for certiorari.[1]

2. The 2012 Act at issue in *Christie I* and the 2014 Act at issue in this case are totally different. The 2012 Act and its implementing regulations established

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[1] To the extent the United States contends that the interpretation of PASPA is no longer at issue here, it is wrong. "[T]here can be little doubt that granting certiorari to determine whether a statute is constitutional fairly includes the question of what that statute says." *Rumsfeld* v. *FAIR*, 547 U.S. 47, 56 (2006).

a full-throated state licensing and regulatory scheme. The 2014 Act removes all such regulation, leaving the relevant State's regulatory agencies with no authority to regulate sports gambling at particular locations. *See* Petition in 16-476 at 5-6, 9-11.

Moreover, the lifting of the prohibition of sports gambling is not limited to licensed gambling venues. Instead, sports gambling is not prohibited at particular locations, including the racecourses of former racetracks in New Jersey. There are two former racetracks in New Jersey – Garden State Park and Atlantic City Racecourse. Neither of these former racetracks holds a gambling license. Indeed, the former Garden State Park racecourse is currently the site of a privately owned shopping mall whose stores are not state-licensed gambling venues. Yet under the 2014 Act, sports gambling is not prohibited there. And if Monmouth Park were to cease operation as a racetrack and give up its license, sports betting would not be prohibited there either.

Under the 2014 Act, at each of these locations, a person could engage in sports betting as freely as he could wear a hat, sing a song, write a poem, or hug his child – or any of the myriad activities that one can do by virtue of the "right to do that which is not prohibited," a right that "derives not from the authority of the state but from the inherent rights of the people." *Nat'l Collegiate Athletic Ass'n* v. *Governor of New Jersey*, 730 F.3d 208, 232 (3d Cir. 2013).

II. THIS CASE IS NOT AN ORDINARY PREEMPTION CASE.

1. The United States now joins the ranks of those who have failed to identify a single Act of Congress under the Commerce Clause (other than PASPA itself) that purports to preempt state law except as an adjunct to direct federal regulation or deregulation. *See* U.S. Brief at 12 n.5 (listing statutes, none of which is based on the Commerce Clause and purports to preempt state law except as an adjunct to direct federal regulation or deregulation); *id.* at 19 & n.6 (same).

The United States points to a number of federal laws protecting against various forms of discrimination by the States. *Id.* But PASPA is not an anti-discrimination statute; it does not bar States from treating betting on basketball differently than betting on football. And even if Congress *had* passed a statute prohibiting the States from treating betting on basketball differently than betting on football, and even if New Jersey *had* lifted its laws against betting on basketball but not on football, the appropriate judicial remedy would *not* be to require New Jersey to prohibit betting on basketball; it would be to block New Jersey from prohibiting betting on football – just as the appropriate judicial remedy for imposition of an unlawfully discriminatory tax is a refund of tax paid by the harmed party, not an order to tax the benefited party. As Justice Brandeis explained long ago, "The right invoked is that to equal treatment; and such treatment will be attained if either their competitors' taxes are increased or their own reduced." *Iowa-Des Moines Nat.*

Bank v. *Bennett*, 284 U.S. 239, 247 (1931). But the proper judicial remedy is "refund of the excess of taxes exacted from them." *Id.*

Tellingly, the only case that the United States cites for the proposition that a State can be required to enforce a repealed law is *Riley* v. *Kennedy*, 553 U.S. 406 (2008). *Riley* arose under section 5 of the Voting Rights Act – "a drastic departure from basic principles of federalism," upheld as a means of enforcing the 15th Amendment precisely because "exceptional conditions can justify legislative measures not otherwise appropriate." *Shelby Cty., Ala.* v. *Holder*, 133 S. Ct. 2612, 2618 (2013) (internal quotation marks and citation omitted). *Riley* itself did not compel the enforcement of a repealed law, and the dissent in *Riley* acknowledged that requiring a State to administer a law it has repealed is offensive to state sovereignty, but observed that the Voting Rights Act, "by its nature, intrudes on state sovereignty." *Riley*, 553 U.S. at 436 (Stevens, J., dissenting) (internal quotation marks and citation omitted). Intrusions on state sovereignty can be imposed under the Reconstruction Amendments that could not be imposed under the Commerce Clause. *Compare, e.g.*, *Seminole Tribe of Florida* v. *Florida*, 517 U.S. 44 (1996) *with Fitzpatrick* v. *Bitzer*, 427 U.S. 445 (1976).

2. The United States never comes to grips with the meaning of the injunction issued in this case. The district court injunction, affirmed by the court of appeals, enjoined the State Defendants from "giving operation or effect to the 2014 [Act]." Pet. Appx. D at

113a. The 2014 Act repealed prior state law prohibitions on sports gambling. If the State Defendants cannot give effect to that repeal, then they must continue to treat the repealed law as if it were still in effect. Thus, despite the assertions of the United States to the contrary, *see* U.S. Brief at 14, PASPA, as construed by the court of appeals, *does* require New Jersey in its sovereign capacity to regulate its own citizens. In particular, if Monmouth Park were to begin to offer sports betting, it would find itself in violation of *state* law that the state legislature repealed, and subject to prosecution in *state* court by *state* executive officials, who themselves would risk being held in contempt by a *federal* court if they failed to bring that *state* law prosecution in *state* court.

III. THE PROHIBITION OF PRIVATE SPORTS GAMBLING "PURSUANT TO THE LAW OR COMPACT OF A GOVERNMENTAL ENTITY" IS NOT INDEPENDENT OF THE PROHIBITION OF A "GOVERNMENTAL ENTITY" LICENSING OR AUTHORIZING SPORTS GAMBLING "BY LAW OR COMPACT."

PASPA makes it unlawful for "(1) a governmental entity to * * * license, or authorize by law or compact, or (2) a person to sponsor, operate, advertise, or promote, pursuant to the law or compact of a governmental entity," sports gambling. Contrary to the assertion of the United States, U.S. Brief at 22, the secondary prohibition on private conduct is both textually and

functionally dependent on the primary prohibition on state conduct.

Textually, the secondary prohibition on a private actor engaging in sports gambling "pursuant to the law or compact of a governmental entity" is plainly a reference to the "license" or "authoriz[ation] by law or compact" that the primary prohibition in that same sentence tells a "governmental entity" not to provide. The secondary prohibition is no more independent of the primary prohibition than section 5 of the Voting Rights Act is independent of the coverage formula of section 4: in both statutes, the earlier language establishes the scope of the later prohibition.

Functionally, if there is no primary violation by a "governmental entity" – either because the governmental entity has not violated the statutory prohibition as properly construed or because the statutory prohibition is unconstitutional – there is no predicate for a secondary violation by a private person acting "pursuant to" the forbidden "law or compact of a governmental entity." If New Jersey's 2014 repeal of its prohibition on sports betting at particular locations is valid, then the legal status under New Jersey law of betting on sports at Monmouth Park is the same as the legal status under New Jersey law of wearing a hat, singing a song, writing a poem, or hugging one's child – and only in a totalitarian state would it be said that these activities are done "pursuant to the law or compact of a governmental entity."

IV. THIS CASE IS IMPORTANT AND PRESENTS AN ISSUE DIVIDING LOWER COURTS.

1. Contrary to the assertion by the United States, *see* U.S. Brief at 22, numerous states have enacted statutes that are put at risk by the court of appeals decision. *See* NJTHA Petition at 14 & n.4. (noting nine states that have laws authorizing daily fantasy wagering on athletic performances and twenty-four other states in which such legislation has been introduced). PASPA by its terms reaches gambling on the performances of athletes.

2. The United States dismisses the significance of three decisions by state courts of last resort as "simply quot[ing] *New York* and *Printz*." U.S. Brief at 22 n.9. But those decisions did more than that; they relied on *New York* and *Printz* to uphold state medical marijuana laws that partially lifted prior state laws prohibiting marijuana.

The highest courts of Michigan and Arizona held that the federal Controlled Substances Act does not preempt state medical marijuana laws because Congress lacks the constitutional authority to require states to prohibit marijuana. *Ter Beek* v. *City of Wyoming*, 846 N.W.2d 531, 537-39 (Mich. 2014) (rejecting preemption of state medical marijuana law that provides "a limited *state-law* immunity" because the Controlled Substances Act does not, and could not under *Printz* and *New York*, compel the states to prohibit marijuana) (emphasis in original); *Reed-Kaliher* v.

Hoggatt, 347 P.3d 136, 141 (Ariz. 2015) (finding *Ter Beek* "persuasive" in reasoning "that the statute does not prevent federal authorities from enforcing federal law – it merely provides "a limited state-law immunity"). The Supreme Court of Montana held that a state court could not require a defendant to comply with federal law without providing an exception for the use of medical marijuana. It relied on *New York*, *Printz*, and Judge Kozinski's concurrence in *Conant*, and explained that the medical marijuana act "is a valid exercise of Montana's police power under the dual state and federal structure embodied in the United States Constitution." *State* v. *Nelson*, 195 P.3d 826, 834 (Mont. 2008).

If the United States and the court of appeals are correct, all three of these decisions are wrong. As the United States and the court of appeals would have it, Congress can use its power to regulate interstate commerce to prohibit states from partially repealing their criminal laws. But all three of those courts concluded that Congress lacked the constitutional authority to do so.

None of these state medical marijuana laws repealed all state laws prohibiting marijuana. Instead, those laws removed state anti-marijuana laws only for certain individuals with certain diseases that qualified for the exemption, who received designated state identification cards, and who possessed limited quantities of marijuana in limited locations. *See Reed-Kaliher* v. *Hoggatt*, 347 P.3d 136, 139 (Ariz. 2015) (noting that the Arizona medical marijuana law "permits those who

meet statutory conditions to use medical marijuana" and that "marijuana possession and use are otherwise illegal in Arizona" and describing some of those statutory conditions); *State* v. *Nelson*, 195 P.3d 826, 828 (Montana 2008) (noting that under the Montana medical marijuana act, "it is legal for citizens to use medical marijuana in order to treat a variety of 'debilitating medical conditions,' provided they have received written certification from a physician that the potential benefits of medical marijuana use would outweigh the health risks, they are accepted in the Program by [a state agency], and otherwise comply with the requirements of the [act]"); *Ter Beek* v. *City of Wyoming*, 846 N.W.2d 531, 534 n.1 (2014) (noting that the Michigan medical marijuana act "specifies the circumstances under which a person can register with the state as a qualifying medical marijuana patient. Upon satisfaction of these criteria, the state issues a registry identification card to the qualifying patient."). Indeed, the narrow scope of these conditions would count as state "authorization" as understood by the United States and the court of appeals.

Nor is the significance of this case limited to gambling and marijuana. If Congress has the power that the United States and the court of appeals think it has, it can use this legislative technique in a virtually limitless set of circumstances.

The petition should be granted.

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